83-6413

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. _____

CHRISTOPHER A. BURGER,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Joseph M. Nursey
Millard C. Farmer
P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(A) CHRISTOPHER BURGER, AN INDIGENT, MENTALLY DEFICIENT, POSSIBLY BRAIN DAMAGED SEVENTEEN-(17) YEAR-OLD FACING THE DEATH PENALTY IN A STATE COURT CAPITAL TRIAL WAS ENTITLED TO THE APPOINTMENT OF COUNSEL WHOSE REPRESENTATION WAS NOT AFFECTED BY A SERIOUS CONFLICT OF INTEREST.

(B) CHRISTOPHER BURGER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO INVESTIGATE, PREPARE OR PRESENT EVIDENCE FOR THE SENTENCING PHASE OF PETITIONER'S CAPITAL TRIAL.

II. WHETHER THE AGGRAVATING CIRCUMSTANCE SET OUT IN GA. CODE ANN. §27-2534.1(b)(7) [OCGA §17-10-30 (b)(7)], THE SOLE AGGRAVATING CIRCUMSTANCE UPON WHICH CHRISTOPHER BURGER'S DEATH SENTENCE WAS BASED, WAS APPLIED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

III. WHETHER THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AT PETITIONER'S TRIAL IMPROPERLY SHIFTED THE BURDEN OF PROOF OF AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(A) THIS COURT HAS RECENTLY GRANTED CERTIORARI IN KOEHLER v. ENGLE, cert granted ___ U.S. ___, 104 S.Ct. 231 (1983). THE PRESENT CASE RAISES SIMILAR ISSUES, BUT IS INCONSISTENT WITH THE OPINION BELOW IN KOEHLER. ACCORDINGLY, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THESE CONFLICTS.

(B) THE HOLDING OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE HOLDING OF THIS COURT IN SANDSTROM v. MONTANA, 442 U.S. 510 (1979).

(C) THE COURT SHOULD GRANT CERTIORARI IN THIS CASE IN ORDER TO CLARIFY TWO CRUCIAL AMBIGUITIES IN CONNECTICUT v. JOHNSON, ___ U.S. ___, 103 S.Ct. 969 (1983). DOING SO WILL ALSO PERMIT THIS COURT TO RESOLVE A SIGNIFICANT SPLIT IN THE LOWER COURTS CONCERNING THE MEANING OF SANDSTROM v. MONTANA.

(D) THE AREA OF CONSTITUTIONAL BURDEN OF PROOF REQUIREMENTS IS IN NEED OF ATTENTION BY THIS COURT DUE TO ITS AMBIGUITY AS PERCEIVED BY THE LOWER COURTS.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

HOW THE ISSUES WERE RAISED BELOW 2

STATEMENT OF THE CASE 2

(A) Course of Proceedings 2

(B) Statement of Facts 3

REASONS FOR GRANTING THE WRIT 5

I. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 5

(A) CHRISTOPHER BURGER, AN INDIGENT, MENTALLY DEFICIENT, POSSIBLY BRAIN DAMAGED SEVENTEEN-(17) YEAR-OLD FACING THE DEATH PENALTY IN A STATE COURT CAPITAL TRIAL WAS ENTITLED TO THE APPOINTMENT OF COUNSEL WHOSE REPRESENTATION WAS NOT AFFECTED BY A SERIOUS CONFLICT OF INTEREST. 5

(B) CHRISTOPHER BURGER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO INVESTIGATE, PREPARE OR PRESENT EVIDENCE FOR THE SENTENCING PHASE OF PETITIONER'S CAPITAL TRIAL 13

II. CHRISTOPHER BURGER'S DEATH SENTENCE WAS BASED SOLELY ON THE AGGRAVATING CIRCUMSTANCE SET OUT IN GA. CODE ANN. §27-2534.1(b)(7); OCGA §17-10-30(b)(7) WHICH WAS APPLIED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 19

III. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AT PETITIONER'S TRIAL IMPROPERLY SHIFTED THE BURDEN OF PROOF OF AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES . . . 23

(A) THIS COURT HAS RECENTLY GRANTED CERTIORARI IN KOEHLER v. ENGLE, cert granted ___ U.S. ___, 104 S.Ct. 231 (1983). THE PRESENT CASE RAISES SIMILAR ISSUES, BUT IS INCONSISTENT WITH THE OPINION BELOW IN KOEHLER. ACCORDINGLY, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THESE CONFLICTS . . . 23

(B) THE HOLDING OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE HOLDING OF THIS COURT IN SANDSTROM v. MONTANA, 442 U.S. 510 (1979) 24

(C) THE COURT SHOULD GRANT CERTIORARI IN THIS CASE IN ORDER TO CLARIFY TWO CRUCIAL AMBIGUITIES IN CONNECTICUT v. JOHNSON, ___ U.S. ___, 103 S.Ct. 969 (1983). DOING SO WILL ALSO PERMIT THIS COURT TO RESOLVE A SIGNIFICANT SPLIT IN THE LOWER COURTS CONCERNING THE MEANING OF SANDSTROM v. MONTANA. 26

(D) THE AREA OF CONSTITUTIONAL BURDEN OF PROOF REQUIREMENTS IS IN NEED OF ATTENTION BY THIS COURT DUE TO ITS AMBIGUITY AS PERCEIVED BY THE LOWER COURTS 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES CITED	Pages
Argersinger v. Hamlin, 407 U.S. 24 (1972)	13
Baker v. Munay, 619 F.2d 327 (4th Cir. 1980).	27
Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978) . . .	2
Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980)	2
Burger v. Zant, 513 F.Supp. 772 (S.D. Ga. 1981)	passim
Burger v. Zant, 718 F.2d 979 (1983), rehearing en banc denied, ___ F.2d ___ (Feb. 13, 1984)	passim
Burton v. Bergman, 649 F.2d 428 (6th Cir. 1981)	27,28,29
Carter v. Jago, 637 F.2d 449 (6th Cir. 1980)	28
Connecticut v. Johnson, ___ U.S. ___, 103 S.Ct. 969 (1983)	26
Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) . . .	14
Cuyler v. Sullivan, 446 U.S. 335 (1980)	11,12
Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981)	27,28
Eddings v. Oklahoma, 455 U.S. 104 (1982)	8,18
Fleming v. State, 264 Ga. 90, 270 S.E.2d 185 (1980) . . .	9
Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) . .	11
Gideon v. Wainwright, 372 U.S. 335 (1963)	13
Godfrey v. Georgia, 446 U.S. 520 (1980)	22
Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982)	14
Holloway v. Arkansas, 435 U.S. 489 (1978)	9,11,12
Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028 (1981)	28
Jacks v. Duckworth, 651 F.2d 480 (7th Cir. 1981)	28
Koehler v. Engle, 707 F.2d 241 (6th Cir. 1983), cert. granted, ___ U.S. ___, 104 S.Ct. 231 (1983)	23,26
McMann v. Richardson, 397 U.S. 759 (1970)	14
Mancuso v. Harris, 677 F.2d 206 (2nd Cir. 1982)	28
Moore v. United States, 432 F.2d 730 (3rd Cir. 1970) . . .	14
Pigee v. Israel, 503 F.Supp. 1170 (E.D. Wis. 1980) . . .	29

Ross v. Heyne, 638 F.2d 979 (7th Cir. 1980) 10

Sandstrom v. Montana, 442 U.S. 510 (1979) 23,24,25, 26,27,28,29 8,9,14

Stephens v. Zant, 631 F.2d 397, modified, 648 F.2d 446 (1981), rev'd, ___ U.S. ___, 103 S.Ct. 2733 (1983) 19,20

United States v. Ash, 413 U.S. 300 (1973) 13,14

United States v. Donahue, 560 F.2d 1039 (1st Cir. 1977) 10

United States v. Flannagan, 679 F.2d 1075 (3d Cir. 1982) 10

United States v. Mandell, 525 F.2d 671 (7th Cir. 1975) 11

Van Moltke v. Gillies, 332 U.S. 708 (1945) 14

Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B en banc), cert. granted, ___ U.S. ___, 103 S.Ct. 2451 (1983) 13

Wilson v. Zant, 249 Ga. 373, 290 S.E.2d 442 (1982) . . . 28

Wood v. Georgia, 450 U.S. 261 (1981) 9

Young v. Zant, 677 F.2d 792 (11th Cir. 1982) 17

Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983) 19,20, 21,22

Zuck v. Alabama, 588 F.2d 436 (5th Cir. 1979) 10

STATUTES CITED Pages

28 U.S.C. §1254 1

28 U.S.C. §2254 3

Ga. Code Ann. §26-1101; OCGA §16-5-1 24

Ga. Code Ann. §27-2534; OCGA §17-10-30 2,19

OTHER AUTHORITY

ABA CODE OF PROFESSIONAL RESPONSIBILITY DR5-105 10

ABA Standards Relating to the Administration of Criminal Justice, The Defense Function §3.5(b) . . . 10

Allen, "Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices", 94 Harv. L. Rev. 321 (1980) 29

Nesson, "Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen", 94 Harv. L. Rev. 1574 (1980) 29

Schmolesky," County Court of Ulster County v. Allen, and Sandstrom v. Montana: The Supreme Court Lends an Ear but Turns Its Face", 33 Rutgers L. Rev. 261 (1981) 29

Jefferies & Stephan, "Defense, Presumptions, and Burden of Proof in the Criminal Law", 88 Yale L. J. 1325 (1979) 29

Lushing, "Faces Without Features: The Surface Validity of Criminal Inferences", 72 J.C. & Crim. 82 (1981) 29

Allen and DeGrazia, "The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts", 20 Am. Crim. L. Rev. 1 (1982) 29

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHRISTOPHER A. BURGER,	*	
	*	
Petitioner,	*	
v.	*	No. 83- _____
	*	
WALTER ZANT, Warden, Georgia Diagnostic and Classification Center,	*	
	*	
Respondent	*	

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Christopher Burger, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in Burger v. Zant, 718 F.2d 979 (1983). Christopher Burger is currently under sentence of death in the State of Georgia.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals rendered on October 13, 1983 is reported at 718 F.2d 979. A copy of the Eleventh Circuit slip opinion is attached as Appendix A. Rehearing en banc was denied by the Court of Appeals on February 13, 1984. (Appendix B).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The opinion of the Court of Appeals was rendered October 13, 1983, rehearing and rehearing en banc denied February 13, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following sections of the Georgia Code: Ga. Code Ann. §§26-1101(a); 27-2534; OCGA §§16-5-1(a); 17-10-30, which are attached as Appendix C.

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues in the Questions Presented were raised by petition for writ of habeas corpus in the district court and raised on appeal to the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE[1]

A. Course of Proceedings

Seventeen (17) year old Christopher Burger, who had no prior criminal record, was convicted of one count of murder and sentenced to death on January 25, 1978 in the Superior Court of Wayne County, Georgia. On appeal to the Supreme Court of Georgia, the conviction was affirmed, but the death sentence was vacated and the case remanded for retrial solely on the issue of penalty. Burger v. State, 242 Ga. 28, 247 S.E. 2d 834 (1978).

On retrial, Christopher Burger was sentenced to death on July 19, 1979. The death sentence was affirmed by the Supreme Court of Georgia. Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980).

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1. References to the transcript of Petitioner's first trial where the issue of guilt/innocence was decided will be designated "T Trial"; references to Petitioner's second trial where sentence was decided will be designated "T Sent. Trial"; references to the evidentiary hearing held in the habeas corpus proceedings in the United States District Court for the Southern District of Georgia will be designated "T H.C.".

On October 1, 1980, Petitioner filed a state Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia. The Petition was summarily denied without a hearing. On the same day, the Supreme Court of Georgia denied an application for certificate of probable cause to appeal.

On October 2, 1980, a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 was filed in the United States District Court for the Southern District of Georgia. An evidentiary hearing was held in the district court on March 4, 1981.

On April 29, 1981, the district court granted habeas corpus relief, only vacating Petitioner's death sentence. The district court denied relief on all other grounds alleged. Burger v. Zant, 513 F.Supp. 772 (S.D.Ga. 1981).

An appeal and cross-appeal of the district court's order were made to the United States Court of Appeals for the Eleventh Circuit.

On appeal, a panel of the Eleventh Circuit,[2] by a vote of 2-1, in an opinion by Circuit Judge Vance, reversed the district court's grant of habeas corpus relief and affirmed the district court in all other respects, effectively reinstating Petitioner's sentence of death. Circuit Judge Johnson dissented with an opinion. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983), rehearing en banc denied, ___ F.2d ___ (Feb. 13, 1984).

B. Statement of Facts

Christopher Burger was convicted for the murder of Roger Honeycutt on September 5, 1977.

During the evening of September 5, 1977, seventeen (17) year old Christopher Burger and his twenty (20) year old co-indictee, Thomas Stevens, both privates in the Army, stationed at Ft.

2. Honorable Clarence Allgood, United States District Judge, Northern District of Alabama sat by designation.

Stewart, Georgia, were drinking heavily. When they ran out of money to buy beer, Stevens decided to rob a taxi driver to obtain more money. Stevens then obtained a knife and knife sharpener to accomplish the robbery.

Stevens and Christopher Burger called the taxi which was driven by Roger Honeycutt. Mr. Honeycutt was threatened with the weapons obtained by Stevens and Stevens took the sixteen dollars ($16.00) in Honeycutt's possession.

At Stevens' direction, Christopher Burger drove the taxi with Stevens and Mr. Honeycutt in the back seat. Mr. Honeycutt was then sexually assaulted by Stevens. After the assault, Stevens locked Roger Honeycutt in the trunk of the taxi.

Christopher Burger and Stevens then drove to the Savannah, Georgia airport to pick up James Botsford, an acquaintance of Stevens and Petitioner. Botsford testified for the state that during the drive, Stevens told him in great detail about the robbery of Roger Honeycutt and the fact that Honeycutt was still in the trunk of the car. During this time, Christopher Burger sat quietly; it appeared to Botsford that Christopher Burger was essentially doing as Stevens directed.

When Stevens suggested that he would kill Roger Honeycutt, Christopher Burger protested that they should let Honeycutt go and ditch the taxi.

After Botsford was dropped off at Fort Stewart, Georgia, Stevens directed Christopher Burger to drive the taxi to a pond in rural Wayne County, Georgia, a few miles from Fort Stewart. At Stevens direction, Christopher Burger drove the taxi into the pond, drowning Roger Honeycutt.

Stevens then disposed of the remaining physical evidence of the offense.

The further facts necessary to the issues raised in this petition will be stated in the argument of the issues.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

(A) CHRISTOPHER BURGER, AN INDIGENT, MENTALLY DEFICIENT, POSSIBLY BRAIN DAMAGED SEVENTEEN-(17) YEAR-OLD FACING THE DEATH PENALTY IN A STATE COURT CAPITAL TRIAL WAS ENTITLED TO THE APPOINTMENT OF COUNSEL WHOSE REPRESENTATION WAS NOT AFFECTED BY A SERIOUS CONFLICT OF INTEREST.

Alvin Leaphart of Leaphart & Smith, P.C., a two person law firm in Jesup, Georgia was appointed by the trial court as counsel for Christopher Burger at the state court trial, at the second penalty trial and on direct appeal to the Supreme Court of Georgia. Mr. Leaphart's law partner, Robert Smith, was appointed by the trial court to represent Thomas Stevens, the co-indictee of Christopher Burger (T-HC 13).

Mr. Leaphart never informed Christopher Burger of the possibility of a conflict of interest nor did the trial court which made the appointment of counsel ever inquire into the possibility of a conflict of interest (T-HC 15-16).

The facts of this conflict of interest are clearly summarized in Circuit Judge Johnson's dissent to the Eleventh Circuit's opinion in this case.[3] Judge Johnson summarized these facts as follows:

> . . . the record is clear that Burger's counsel was actively representing both Burger and his co-indictee Stevens and that an actual conflict of interest between the two violated Burger's right to the effective assistance of counsel.

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3. No facts of the conflict of interest were stated in the majority opinion. The majority opinion adopted, without further comment on this issue, the decision of the District Court below. Burger v. Zant, 718 F.2d at 981.

First, it is apparent that Burger's counsel actively represented both Burger and Stevens. Both Burger and Stevens were charged with and indicted for the murder of Roger Honeycutt. Both Burger and Stevens were appointed counsel by the trial court at approximately the same time, and within a few weeks after they had been charged with the crime. Burger's appointed counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. [T-HC 13-15]. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. [T-HC 15]. Leaphart testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. [T-HC 15, 18]. Leaphart and Smith discussed the issues involved in each case and researched the law together. [T-HC 18]. Smith sat at counsel table and assisted Leaphart during Burger's trial. [T-HC 18]. Although not physically present at Stevens' trial, Leaphart testified that 'I worked then with - discussed the issues with Dob [Smith]. We researched the law together.' [T-HC 18]. Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he 'primarily' prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court of Georgia. [T-HC 40-41]. The fee received by each attorney for representing each client was deposited in the law firm's corporate account. [T-HC 14-15, 27-28]. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest. [T-HC 15-16]

Whether analyzed as a situation where one attorney, Leaphart, represented both Burger and Stevens, or where one law firm represented both Burger and Stevens, the end result on these facts is the same: Leaphart was actively involved in the defense of both to the extent that a conflict of interest was clearly established.

* * * * * * * *

In this case, the fundamental issue, as perceived by counsel, was not that of guilt, but of culpability. Upon the habeas corpus hearing Leaphart testified at length concerning the evidence supporting Burger's lesser degree of culpability for the murder as compared to Stevens'. Summarized, the evidence was that at the time the crime was

committed Burger was seventeen; Stevens was twenty. [T-HC 22]. Burger has an I.Q. of 82 and possible brain damage. [T-HC 25; T Trial I 244, 247-248]. Stevens appeared to be the leader in their relationship; Burger the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. [T -HC 22-23]. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In such a situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense,damage Stevens. An actual conflict of interest between Burger and Stevens is thus apparent. Stated differently, Burger's interests were drastically adverse to those of Stevens.

* * * * * * *

The course of Burger's state court proceedings illuminates the duty owed him by Leaphart to take actions that could be detrimental to Stevens. First, Leaphart did not at any time in his representation of Burger offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger. [T-HC 38-39, 65].

* * * * * * *

Second, at Burger's trial Stevens was not called as a witness by the defense. If Stevens had been called by the state, Leaphart would have been placed in the untenable position of cross-examining his own client. Finally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less culpable party, although the scope of the Supreme Court of Georgia's appellate review

> in capital cases includes a consideration of whether the 'sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant.' OCGA §17-10-35(c) (3) (1982), formerly Ga. Code Ann. §27-2537 (c)(3) (1933).

Burger v. Zant, 718 F.2d at 988-990, (dissenting opinion of Circuit Judge Johnson). (Emphasis added) (footnotes omitted).

A situation more conducive to divided loyalties than the situation in this case can hardly be imagined. Faced with the serious conflicts between Christopher Burger and Stevens, there is no way that the two law partners could vigorously and fully represent Christopher Burger while also representing Stevens.[4] Attorney Leaphart perceived a defense based on the seventeen-(17) year-old Christopher Burger's lesser culpability vis-a-vis the adult Stevens. However any action taken by Leaphart on behalf of Christopher Burger would work to the extreme disadvantage of Stevens.

Faced with the previously detailed disparity in the culpabilities of the parties and realizing that punishment rather than guilt or innocence was the major issue in this case, Attorney Leaphart should have offered Christopher Burger's testimony against Stevens to the prosecution in exchange for a lesser sentence than death. Unfortunately, Mr. Leaphart never even raised this possibility in plea discussions with the State (T-HC 38-39, 65). And, of course, how could he have arranged this plea negotiation when his divided loyalties also required the protection of Stevens.

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4. This Court recently reemphasized the importance of consideration of the individual in the sentencing phase of a capital case. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982):

> ". . . the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the

This Court in Wood v. Georgia, 450 U.S. 261, 268-69 (1981), clearly recognized as one of the "inherent dangers" of a conflict of interest that the attorney with divided loyalties "will prevent his client from obtaining leniency by preventing his client from offering testimony against" the more culpable party.[5]

In Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978), this Court, in addressing the problem of conflicts of interest in the representation of multiple defendants by single counsel, stated:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable.

Leaphart was actively involved in the representation of Christopher Burger's co-defendant, Stevens; he consulted

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(Footnote 4, continued)

> process of inflicting the penalty of death [quoting Gregg v. Georgia]"
>
> * * * * * *
>
> "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett [v Ohio] recognizes a consistency produced by ignoring individual differences is a false consistency" (emphasis added).

5. The Supreme Court of Georgia, subsequent to Christopher Burger's trials, adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. This rule applies with equal force to representation by a single attorney or by members of the same law firm. Fleming v. State, 264 Ga 90, 270 S.E.2d 185, 188 and n.7 (1980). "Such a rule is especially necessary where the death penalty is sought, because in these cases even a slight conflict, irrelevant to guilt or innocence, may be important in the sentencing phase." Id. at 188.

   The logic of this rule, explained by Justice Bowles of the Georgia court in his concurring opinion is particularly

confidentially with Stevens, aided in preparing his case for trial and prepared his briefs on appeal (T-HC 13-18). However, even had Leaphart not been directly involved in the representation of Stevens, a Sixth Amendment conflict of interest would still exist where the joint representation was by two different members of the same firm.[6]

(Footnote 5, continued)

relevant in Christopher Burger's case:

> No two defendants share equal responsibility for a crime . . . One may [be] entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining.
>
> Id. at 189 (Bowles, J, concurring) (emphasis added).

6. Eg. United States v. Flannagan, 679 F.2d 1075 (3d Cir. 1982); Ross v. Heyne, 638 F.2d 979, 983 (7th Cir. 1980); Zuck v. Alabama, 588 F.2d 436, 438 (5th Cir. 1979); United States v. Donahue, 560 F.2d 1039, 1042 (1st Cir. 1977).

Cf. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR5-105 (D); ABA Standards Relating to the Administration of Criminal Justice, The Defense Function §3.5(b):

> Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation. (emphasis added).

The fault in this case lies not only with Mr. Leaphart who failed to call to the court's or Christopher Burger's attention the conflict of interest.[7] The blame must fall, possibly more heavily, on the trial court which appointed one law firm to represent both co-defendants and failed to ever inform Christopher Burger of the conflict.

As stated by the Fifth Circuit in Foxworth v. Wainwright, 516 F.2d 1072, 1076[8] (5th Cir. 1975):

> The trial judge has an obligation, however, to anticipate conflicts reasonably foreseeable at the outset of the case when counsel is appointed.
>
> * * * * *
>
> . . . courts must avoid compromising counsel's ability to represent a client zealously within the bounds of the law by appointing one lawyer to defend two or more parties with inconsistent interests.

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7. Cf. Holloway v. Arkansas, 435 U.S. at 485: ". . . defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem."

   Contrast the circumstances of Christopher Burger's case with those in United States v. Mandell, 525 F.2d 671 (7th Cir. 1975) where trial counsel informed his client of the possible dangers of multiple representation of co-defendants:

   > "We think the Sixth Amendment rights of defendants are adequately safeguarded by imposing the duty of informing defendants of the potential dangers of multiple-client representation initially on the attorneys, as officers of the court. . ." Id. at 677 (emphasis added).

8. The quoted language from Foxworth v. Wainwright was noted with approval in Cuyler v. Sullivan, 446 U.S. 335, 347, n.13 (1980) as an exception to the general rule that the trial court is not required to automatically inquire into the circumstances of multiple representation.

Although great prejudice to Christopher Burger is shown from the facts of the conflict of interest in this case, a showing of prejudice is not necessary. "Thus, a defendant who shows that a conflict of interest actually affected the advocacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980).

As this Court noted in Holloway v. Arkansas, 435 U.S. at 490:

> ". . . in a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial negotiations and in the sentencing process . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

(B) CHRISTOPHER BURGER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO INVESTIGATE, PREPARE OR PRESENT EVIDENCE FOR THE SENTENCING PHASE OF PETITIONER'S CAPITAL TRIAL

This Court has recently granted certiorari in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B, en banc), cert. granted, ___ U.S. ___, 103 S.Ct. 2451 (1983) to consider the issue of the standard for the effective assistance of counsel at the penalty phase of a death penalty trial. As will be developed below, trial counsel's representation of Christopher Burger raises issues similar to those currently before this Court in Washington v. Strickland.

Attorney Leaphart presented absolutely no evidence on Christopher Burger's behalf at either trial; more particularly, no evidence in mitigation was presented on Christopher Burger's behalf at his second trial where sentencing was determined. This failure to present evidence in mitigation of sentence was based not upon "informed professional deliberation", but rather was based on "inexcusable ignorance or senseless disregard of [his] client's rights". Washington v. Strickland, 693 F.2d at 1251.

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense". The Court has frequently emphasized the "fundamental" nature of this constitutional provision, Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963), since, "[t]he assistance of counsel is often a requisite to the very existence of a fair trial." Argersinger v. Hamlin, 407 U.S. 24, 31 (1972). The repeated theme of the Court's decisions is that counsel serves "as a guide through complex legal technicalities" for the lay person, United States v. Ash, 413 U.S. 300, 307 (1973), and as a counterweight in the

adversary system to the creation of a professional prosecuting official. Id. at 309.

Counsel must provide assistance "within the range of competence demanded by attorneys in criminal cases". McMann v. Richardson, 397 U.S. 759, 771 (1970). This encompasses the level of competency provided by attorneys with knowledge, skill, judgment and diligence in the sound practice of criminal law. Cf. Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970).

It necessarily follows from counsel's role that an attorney "must make an independent examination of the facts, circumstances, pleadings and law involved" in order to be in the position to exercise sound professional judgment for the accused. Van Moltke v. Gillies, 332 U.S. 708, 721 (1945). The consensus of the circuits on this point is well-expressed in Moore v. United States, 472 F.2d at 735:

> The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of which even the defendant is unaware and may suggest issues and tactics at trial which would otherwise not emerge.

"At the heart of the duty of effective representation is the independent duty to investigate and prepare." Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982).

The district court below found that Leaphart's investigation into available mitigating evidence consisted solely of conversations with Christopher Burger's mother. 513 F.Supp. at 796-797 and n. 6. These "conversations" were woefully inadequate and apparently occurred only when Christopher Burger's mother arrived in Jesup, Georgia from Louisiana for the trial. As Mr. Leaphart testified at the habeas corpus hearing:

> "Q. When is the first time you talked to any of his [Christopher Burger's] family?
>
> A. [By Mr. Leaphart] Whenever they came to town.

Q. Did you call and tell them about the trial?

A. No, I don't think I did.

Q. Well, the time that the trial was going to happen the first time, you had talked to the family before the--before the supposed--

A. I can't remember. I think I talked with his mother, at some point in time.

Q. Before that.

A. Before the trial?

Q. Before she came to town. You had talked to her.

A. I may have talked to her on the phone. I can't remember.

Q. Did you ask her anything about his background?

A. Yes, I think we discussed it.

Q. Did you explain to her what the penalty phase of the trial was about, and what evidence could be presented then?

A. I don't think I went into that with her."

(T-HC at 36) (emphasis added).

Had Leaphart conducted even a minimal investigation, a wealth of mitigating circumstances could have been found. Judge Johnson in dissent to the Eleventh Circuit's opinion summarized these mitigating circumstances:

> At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. Summarized, this evidence was that Burger's parents had been married when his mother was fourteen and his father was sixteen. [T-HC 81]. His parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent shuffled between the two. His father threw him out of the house; his mother sent him back to live with his father. [T-HC 84]. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence; Burger's stepfather involved him in drugs and alcohol when he was

> eleven years old. [T-HC 84-85]. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hitchhiked to Florida to live with his mother, selling his shoes to buy food along the way. When Burger arrived barefoot in Florida his stepfather told him he could not stay with them. Burger's mother told the juvenile authorities that she didn't want him, and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. [T-HC 85-86]. Burger was taken in by a neighbor, as he had nowhere else to go. [Cf. Affidavits at R-142-153]. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.[9] [T Trial 244, 247-248].
>
> It is absolutely astounding to me that none of this evidence was ever presented to Burger's juries. . .

Burger v. Zant, 718 F.2d at 993 (dissenting opinion of Circuit Judge Johnson).

Leaphart's failure to present this evidence was not a strategic choice. At the federal habeas hearing Leaphart testified:

> "[I] did not have any knowledge of any witnesses that - potential witnesses - that I thought would have benefited him [at sentencing]. Had I known or had any knowledge of any, I would - certainly would have used them.
> (T-HC 44) (emphasis added).

Leaphart assumed, without knowing, that all he could have found would be persons to say that Christopher Burger "was a good boy and went to church", etc. (T-HC 52). Any investigation at all would have corrected this mistaken impression.

---

9. This evidence of Christopher Burger's low I.Q. and possible brain damage was presented only at a motion hearing but was never presented to the jury at either trial.

Two other excuses, outside of the failure to investigate, were given for Leaphart's failure to present evidence in mitigation: (i) Leaphart testified that he wished to preserve opening and closing argument for the defense (T-HC 66-67); (ii) the District Court reasoned that Leaphart wanted to argue to the jury that Christopher Burger had never been in trouble before. 513 F.Supp. at 797.

Neither of these excuses hold water: (i) Ga. Code Ann. §27-2503 (a) & (c) [OCGA §17-10-2 (a) & (c)] provide for the order of closing arguments at sentencing proceedings in capital cases: "The district attorney shall open and the defendant or his counsel shall conclude the argument." There is only one argument by each party. The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and Leaphart closed final arguments to the jury. (T Sent. Trial at 234, 250). Leaphart simply failed to inform himself of basic Georgia criminal procedure in sentencing proceedings. Cf. Young v. Zant, 677 F.2d 792 (11th Cir. 1982).

(ii) At no point in his closing argument at the sentencing trial (T Sent. Trial at 250) did Leaphart argue that Christopher Burger had no record or had never been in trouble before.[10] The District Court's reasoning that he had done so is simply not supported by the record. Leaphart's argument would have been assisted, not harmed, by evidence of Christopher Burger's background.

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10. Christopher Burger's past encounters with the law were for the juvenile status offense of runaway and an automobile accident; he had no prior criminal record.

The mitigating circumstances present in seventeen (17) year old Christopher Burger's case are strikingly similar to those of sixteen-(16) year-old Eddings in Eddings v. Oklahoma, 455 U.S. 104 (1982). If anything, the mitigation in Burger's case is more persuasive.

As this Court stated in Eddings:

> "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation [cite omitted]. In some cases such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense, there can be no doubt that evidence of a turbulent family history of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.
>
> * * * * * *
>
> . . . just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.
> Eddings, 455 U.S. at 115-116.

Eddings' death sentence was reversed by this Court because his sentencer [a judge] refused to consider Eddings' background as a mitigating factor. Christopher Burger's sentencer [a jury] failed to consider Chris' background as a mitigating factor; this was due to trial counsel's failure to investigate or present the evidence. In both Eddings and Chris Burger's case, the sentence of death was imposed without consideration of a "particularly relevant" . . . "mitigating factor of great weight." Id.

II.

CHRISTOPHER BURGER'S DEATH SENTENCE WAS BASED SOLELY ON THE AGGRAVATING CIRCUMSTANCE SET OUT IN GA. CODE ANN. §27-2534.1(b)(7); OCGA §17-10-30(b)(7) WHICH WAS APPLIED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Georgia, a death sentence may not be imposed absent a finding by the jury, beyond a reasonable doubt, of at least one statutory aggravating circumstance. Ga. Code Ann. §27-2534.1(c); OCGA §17-10-30(c). As this Court recently reiterated, ". . . an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2742-43 (1983).

The jury at Christopher Burger's sentencing trial based its death sentence verdict upon the statutory aggravating circumstance set out in Ga. Code Ann. §27-2534.1(b)(2); OCGA §17-10-30(b)(2) and the aggravating circumstance set out in Ga. Code Ann. §27-2534.1(b)(7), OCGA §17-10-30(b)(7) "the offense of murder was outrageously and wantonly vile, horrible or inhumane in that it involved torture, depravity of mind or an aggravated battery to the victim") (T Sent. Trial at 305-306).

On direct appeal, the Supreme Court of Georgia struck as improperly found the aggravating circumstances based on §(b)(2), but upheld the death sentence based solely on the remaining §(b)(7) aggravating circumstance. Burger v. State, 245 Ga. 458, 265 S.E.2d 796, 800 (1980).

In the habeas corpus proceeding, the United States District Court vacated Christopher Burger's death sentence based on the former Fifth Circuit's decision in Stephens v. Zant, 631 F.2d 397, modified, 648 F.2d 446 (1981), rev'd, ___ U.S. ___, 103 S.Ct. 2733 (1983). On appeal, after this Court's decision

reversing the decision of the Fifth Circuit in Stephens v. Zant, the Eleventh Circuit reversed this portion of the district court's judgment, 718 F.2d at 981-82, effectively reinstating Christopher Burger's sentence of death.

Under this Court's holding in Zant v. Stephens, supra, a sentence of death, in Georgia, may be upheld if one valid statutory aggravating circumstance is found by the jury, even if that jury also improperly found other aggravating circumstances. Cf. Zant v. Stephens, 250 Ga. 97, 297 S.E.2d 1 (1982). However, the only statutory aggravating circumstance found by the jury and upheld by the Supreme Court of Georgia in Christopher Burger's case was the §(b)(7) aggravating circumstance.

In Zant v. Stephens, supra, this Court stated the following concerning the §(b)(7) aggravating circumstance:

> "Thus this case [Zant v. Stephens] does not implicate our holding in Godfrey v. Georgia, 446 U.S. 420 (1980), that the (b)(7) aggravating circumstance as construed by the Georgia Supreme Court was unconstitutionally broad and vague".
> Zant v. Stephens, 103 S.Ct. at 2737, n.4.

* * * * * *

> The plurality's approval of Georgia's capital sentencing procedure [in Gregg v. Georgia] rested primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. These elements, the opinion [Gregg v. Georgia] concluded, adequately protected against the wanton and freakish imposition of the death penalty. This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system 'could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found

unconstitutional in Furman could occur.' 428 U.S., at 195, n. 46. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Thus in Godfrey v. Georgia, 446 U.S. 420(1980), the Court struck down an aggravating circumstance that failed to narrow the class of persons eligible for the death penalty. Justice Stewart's opinion for the plurality concluded that the aggravating circumstance described in subsection (b)(7) of the Georgia statute, as construed by the Georgia Supreme Court, failed to create any 'inherent restraint on the arbitrary and capricious infliction of the death sentence,' because a person of ordinary sensibility could find that almost every murder fit the stated criteria. Id., at 428-429.[16] . . .

* * * * * *

---

16. This Court's conclusion in Godfrey was analogous to the Georgia Supreme Court's holding in Arnold v. State that the second clause of the (b)(1) aggravating circumstance, which is at issue in this case, was 'too vague and nonspecific to be applied evenhandedly by a jury.' 236 Ga., at 541. The defendant in that case, who had two prior convictions, had been sentenced to death by the jury solely on a finding that he had a 'substantial history of serious assaultive criminal convictions.' The court concluded that the words 'substantial history' were so highly subjective as to be unconstitutional. Id., at 542; see n. 5 supra. That aggravating circumstance, in the view of the Georgia Supreme Court, did not provide a principled basis for distinguishing Arnold's case from the many other murder cases in which the death penalty was not imposed under the statute.

Zant v. Stephens, 103 S.Ct. at 2742-43, and n. 16 [footnotes 14 and 15 omitted].

This Court in Zant v. Stephens has made clear its ruling in Godfrey v. Georgia, 446 U.S. 520 (1980) that the §(b)(7) circumstance has been unconstitutionally applied in Georgia. Thus, a death sentence based solely on §(b)(7), such as Christopher Burger's, cannot stand.

III.

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AT PETITIONER'S TRIAL IMPROPERLY SHIFTED THE BURDEN OF PROOF OF AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

(A) THIS COURT HAS RECENTLY GRANTED CERTIORARI IN KOEHLER v. ENGLE, cert. granted ___ U.S. ___, 104 S.Ct. 231 (1983). THE PRESENT CASE RAISES SIMILAR ISSUES, BUT IS INCONSISTENT WITH THE OPINION BELOW IN KOEHLER. ACCORDINGLY, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THESE CONFLICTS.

In Koehler v. Engle, 707 F.2d 241, the Sixth Circuit reviewed a set of trial instructions in a trial for murder to the affect that the law provides "a rule of thumb" that "a person is presumed to intend the natural consequences of his acts." Id. at 243. The Sixth Circuit found that these instructions violated Sandstrom, regardless of the presence of other curative instructions. Moreover, the Sixth Circuit stated that such instructions "can be extremely prejudicial even if overall proof of intent or malice is substantial," Id. at 246, and thus declined to find the error harmless.

The present case presents very similar issues to those in Koehler. The instructions are similar, and each case possesses attempted curative instructions. In the present case, however, the Eleventh Circuit affirmed the conviction, and thus it is inconsistent with Koehler. Certiorari is appropriate to resolve this conflict among the circuits.

(B) THE HOLDING OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE HOLDING OF THIS COURT IN SANDSTROM v. MONTANA, 442 U.S. 510 (1979).

In Sandstrom v. Montana, this Court held that the Due Process Clause of the Fourteenth Amendment was violated by a jury instruction that "the law presumes that a person intends the ordinary consequences of his acts" because such an instruction could have been interpreted by the jury either to direct a verdict on the issue of intentionality or to shift the burden of proof on it to the defendant, 442 U.S. at 512. In the Petitioner's case, the State of Georgia was required to prove, among other elements, that the defendant committed the act intentionally, and that he committed the act with malice.[11] The trial court gave the following instructions[12] on these issues that unmistakenly could have been interpreted to shift the burden of proof to the defendant:

> Now, by definition, ladies and gentlemen, in our State a crime is a violation of a statute of this State in which there shall be a union of joint operation of act, or omission to act, and intention, or criminal negligence. I give you certain presumptions of law that are applicable to this case.
>
> A presumption is a conclusion which the law draws from given facts. Each of these presumptions are rebuttable. That is, they are subject to being overcome by evidence to the contrary.
>
> I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention, but the jury may find such

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11. Petitioner was indicted for malice murder. Ga. Code Ann. §26-1101(a); OCGA §16-5-1(a).

12. The complete instructions given at the guilt/innocence phase of Petitioner's trial are set forth in Appendix D to this Petition.

> intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they [sic] accused is prosecuted.
>
> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act. (T Trial 410-411) (emphasis added).

These instructions contain the language crucial to the holding in Sandstrom, "the law presumes," and deal with an element that the state was required to prove beyond reasonable doubt. Moreover, with respect to these presumptions, further instructions informed the jury that these presumptions may be "rebutted." The term "rebutted" is not defined, however, thus leaving it to the jury to speculate what is required to "rebut" the presumptions of malice and intentionality. As a result, like the Sandstrom instruction, each instruction could be interpreted as shifting a burden of persuasion to the defendant.

The order of the district court below, adopted by the panel of the Eleventh Circuit, avoided this obvious conclusion by asserting that other qualifying instructions surrounding the presumptive language rendered the instructed presumption no more than a permissive interference, 513 F.Supp. at 792, and that the instruction as a whole contained enough qualifying language to avoid the holding in Sandstrom. Even if the instructions are viewed as a whole, however, the instant instructions are a clear violation of the principles underlying Sandstrom. To be sure, there is qualifying language in Burger (e.g., "these presumptions are rebuttable") T. Trial at 410, but there is qualifying language in Sandstrom as well, [e.g., the jury "must be convinced beyond reasonable doubt . . . that the defendant caused the death

of (the victim) purposely or knowingly"] Sandstrom Petition for Writ of Certiorari Appendix at 34-35. There is another critical similarity between the instructions in the two cases. Both Sandstrom's and Burger's instructions failed to define the word "presumption" and failed to articulate any standard for applying the presumption or for rebutting the presumption. Thus, even looking at Petitioner's instructions in their entirety, they are in obvious conflict with this Court's decision in Sandstrom v. Montana.

(C) THE COURT SHOULD GRANT CERTIORARI IN THIS CASE IN ORDER TO CLARIFY TWO CRUCIAL AMBIGUITIES IN CONNECTICUT v. JOHNSON, ___ U.S. ___, 103 S.Ct. 969 (1983). DOING SO WILL ALSO PERMIT THIS COURT TO RESOLVE A SIGNIFICANT SPLIT IN THE LOWER COURTS CONCERNING THE MEANING OF SANDSTROM v. MONTANA.

In Connecticut v. Johnson, ___ U.S. ___, 103 S.Ct. 969 (1983), this Court issued a judgment affirming a decision of the Supreme Court of Connecticut in order to resolve a conflict in the lower courts concerning the nature of harmless error analysis as applied in the Sandstrom context. ___ U.S. at ___, 103 S.Ct. at 971. This Court did not resolve that conflict, however. Four members of the Court concurred in the plurality decision, but four dissented, and the ninth justice concurred specially in the judgment. Therefore, the split in the lower courts that gave rise to Johnson remains unresolved. See, e.g., Engle v. Koehler, 707 F.2d 241, at 246 (6th Cir. 1983) cert. granted, ___ U.S. ___, 104 S.Ct. 231 (1983) (citing Connecticut v. Johnson and commenting "the Supreme Court has not supplied clear guidance on this question").

Additionally, and more importantly, this case presents a vehicle for resolving another ambiguity concerning harmless error analysis that has generated yet another split in the circuits. Johnson dealt with whether a conviction may ever be affirmed if

there is a Sandstrom violation in the instructions. The related question that needs to be resolved is whether any curative instructions can rectify the harm done by an instruction to the effect that "the law presumes intent."

In this case, the district court below found that curative instructions did cure the Sandstrom error. In Sandstrom, though, this Court suggested that curative instructions most likely could not offset the harm engendered by "the law presumes" instructions. 442 U.S. at 518-19, n.7. However, the lack of clear guidance on that point has generated another split in the lower courts in need of resolution. In Burton v. Bergman, 649 F.2d 428 (1981), the Sixth Circuit held that the use of the word "presume" is unconstitutional under Sandstrom because of its mandatory tone, while the Eleventh Circuit, adopting the district court's order, in the present case held that the word "presume" or its derivations may be employed in instructions. Moreover, these two cases are merely representative of the great difficulty the lower courts are having in determining how to apply Sandstrom to jury instructions.[13] Thus, this Court should grant certiorari in order to give further guidance to the lower courts on this important matter.

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13. Other courts have held, for example, that "curative language" exacerbates rather than ameliorates the constitutional problems. See, e.g., Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981); Baker v. Munay, 619 F.2d 327 (4th Cir. 1980).

(D) THE AREA OF CONSTITUTIONAL BURDEN OF PROOF REQUIREMENTS IS IN NEED OF ATTENTION BY THIS COURT DUE TO ITS AMBIGUITY AS PERCEIVED BY THE LOWER COURTS

Ever since this Court first held that proof beyond reasonable doubt is constitutionally required, the lower courts have been engaged in an effort to determine the scope of the requirement. Notwithstanding the continuing efforts by this Court to clarify matters, the perception in the lower courts is that the scope of the requirement of proof beyond reasonable doubt is very unclear. Indeed, one can find inconsistent decisions on virtually every aspect of the proof process. For example, compare, Carter v. Jago, 637 F.2d 449 (6th Cir. 1980) (self-defense is an affirmative defense; therefore the defendant must prove it by a preponderance of the evidence) with Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980) cert. denied, 451 U.S. 1028 (1981) (self-defense negates the unlawfulness element of murder; therefore the state must disprove its existence); Mancuso v. Harris, 677 F.2d 206 (2nd Cir. 1982) (language condemned in Sandstrom permissible here because preceded and followed by qualifying language) with Dietz v. Solem, 640 F.2d 126 (8th Cir. 1982) (even with qualifying language, instruction still unconstitutional under Sandstrom); Jacks v. Duckworth, 651 F.2d 480 (7th Cir. 1981) (burden shifting tendency of instruction cured by general instruction on the state's burden of proof and that the jury must consider instructions as a whole) with Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981) (burden shifting or conclusive presumption is type of presumption contemplated in Cupp v. Naughten as constitutional error by itself); Burton v. Bergman, 649 F.2d 428 (6th Cir. 1981) (use of word "presume" unconstitutional under Sandstrom because it gives mandatory tone to instruction) with Wilson v. Zant, 249 Ga. 373, 290 S.E.2d 442 (1982) (presumption permissible despite word "presume" because

jury told it may infer or presume intent); Burton v. Bergman, 649 F.2d 428 (6th Cir. 1981) (Sandstrom retroactive because it raises serious questions about accuracy of guilty verdicts in past trials) with Pigee v. Israel, 503 F.Supp. 1170 (E.D. Wis. 1980) (Burden on criminal justice system, witnesses and families of victims compels that Sandstrom not be retroactively applied).

The view of the commentators is consistent with that of the lower courts. Virtually every scholar who has written in this general area has remarked on the tremendous ambiguity generated by the relevant precedents. [14] Certiorari is appropriate to bring badly needed clarity to this important area.

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14. See, e.g., Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 Harv. L. Rev. 321, 322 (1980) ("profusion of contradictory theories and results" in constitutional burden of proof cases); Nesson, Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen, 94 Harv. L. Rev. 1574 ("reconciling the use of evidentiary devices . . . with the constitutional requirement of proof beyond reasonable doubt has been a persistent problem for courts . . ."). See also, Schmolesky, County Court of Ulster County v. Allen, and Sandstrom v. Montana: The Supreme Court Lends an Ear but Turns Its Face, 33 Rutgers L. Rev. 261 (1981); Jefferies & Stephan, Defense, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1335 (1979); Lushing, Faces Without Features: The Surface Validity of Criminal Inferences, 72 J.C. & Crim. 82 (1981); Allen and DeGrazia, The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts, 20 Am. Crim. L. Rev. 1 1982).

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

Joseph M. Nursey
Millard C. Farmer
COUNSEL FOR PETITIONER

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 13th day of March, 1984.

Joseph M. Nursey
COUNSEL FOR CHRISTOPHER BURGER

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-

CHRISTOPHER A. BURGER,

Petitioner,

v.

WALTER ZANT, Warden,

Georgia Diagnostic Center,

Respondent

RECEIVED
MAR 14 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

83-6413

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, Christopher Burger, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner's affidavit of indigency is attached to this motion.

Respectfully submitted,

Joseph M. Nursey
Millard C. Farmer

COUNSEL FOR PETITIONER

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-6413

CHRISTOPHER BURGER *

Petitioner, *

v. *

WALTER D. ZANT, Warden, *

Georgia Diagnostic Center, *

Respondent *

AFFIDAVIT OF INDIGENCY

I, CHRISTOPHER BURGER, being first duly sworn, depose and say that I am the Petitioner in the above-entitled cause; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ___ No X

a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

_____

_____

b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.

SEPTEMBER, 1977 - $471.00 (U.S ARMY)

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes ___ No X
b. Rent payments, interest or dividends? Yes ___ No X
c. Pensions, annuities or life insurance payments? Yes ___ No X
d. Gifts or inheritances? Yes X No ___
e. Any other sources? Yes ___ No X

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. APPROX $70.00 GIFTS

3. Do you own cash, or do you have money in a checking or savings account? Yes X No ___ (Include any funds in prison accounts.)

If the answer is "yes", state the total value of the items owned. $50.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No X

If the answer is "yes", describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: MARCH 5, 1984

Christopher Burger
CHRISTOPHER BURGER

Sworn to and subscribed to before me
this 5 day of March, 1984.

Aaron Rosenson
NOTARY PUBLIC

My commission expires:
9-20-87

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-6413

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHRISTOPHER A. BURGER,

Petitioner,

v.

WALTER ZANT, Warden
Georgia Diagnostic and
Classification Center,

Respondent

A-755

APPLICATION FOR STAY OF EXECUTION OF SENTENCE OF DEATH PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

To the Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice of the Eleventh Circuit.

Petitioner, Christopher A. Burger, by counsel, prays that an order be entered staying execution of his sentence of death currently set for March 27, 1984 pending disposition by this Court of his Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit which was docketed in this Court on March 14, 1984.

In support of the Application for Stay, Petitioner states:

1.) Petitioner, Christopher Burger, who was seventeen (17) years old at the time of the offense, was convicted of murder and sentenced to death on January 25, 1978 in the Superior Court of Wayne County, Georgia. On appeal to the Supreme Court of Georgia, the conviction was affirmed, but the death sentence was vacated and the case remanded for retrial solely on the issue of penalty. Burger v. State, 242 Ga. 28, 247 S.E.2d 854 (1978).

2.) On retrial, Christopher Burger was resentenced to death. The death sentence was affirmed on appeal. Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980).

3.) After exhaustion of state post-conviction remedies, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Georgia. On April 29, 1981, the district court granted habeas corpus relief vacating Petitioner's sentence of death only, denying relief on all other grounds alleged. Burger v. Zant, 513 F.Supp. 772 (S.D. Ga. 1981).

4.) An appeal and cross-appeal of the district court's order were made to the United States Court of Appeals for the Eleventh Circuit. A panel of the Eleventh Circuit, by a vote of 2-1, in an opinion by Circuit Judge Vance, reversed the district court's grant of habeas corpus relief and affirmed the district court in all other respects, effectively reinstating Petitioner's sentence of death. Circuit Judge Johnson dissented with an opinion. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983), rehearing en banc denied, ___ F.2d ___ (Feb. 13, 1984).

5.) On February 27, 1984, the Eleventh Circuit, per Judge Vance, denied a motion to stay the mandate pending application for certiorari. The mandate of the Eleventh Circuit was issued that date. (A copy of the order denying a stay of mandate is attached hereto as Appendix A).

6.) On March 14, 1984, Petitioner's Petition for Writ of Certiorari was docketed in this Court as No. 83-6413.

7.) On March 15, 1984, the Superior Court of Wayne County, Georgia ordered that Christopher Burger's sentence of death be executed on March 27, 1984. Undersigned counsel received notice of this execution date by mail on Saturday, March 17, 1984. (A copy of the sentencing order is attached as Appendix B).

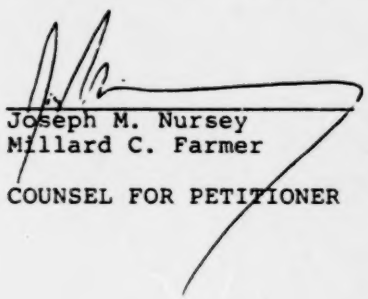
8.) Petitioner's Petition for Writ of Certiorari contains two (2) issues which are currently before this Court in other cases. The Petition raises the issue of a burden shifting jury instruction that "a person of sound mind and discretion is presumed to intend the material and probable consequences of his acts." This issue is before this Court in Koehler v. Engle, cert. granted, ___ U.S. ___, 104 S.Ct. 231 (1983).

The Petition also raises the issue of ineffective assistance of trial counsel due to his failure to adequately investigate and prepare for the sentencing phase of Christopher Burger's capital trial. This issue is before this Court in Washington v. Strickland, cert. granted, ___ U.S. ___, 103 S.Ct. 2451 (1983).

9.) Petitioner's Petition for Writ of Certiorari raises two (2) other meritorious issues: (a) whether seventeen (17) year old Christopher Burger, an indigent person of very low intelligence and possibly brain damaged, was denied the effective assistance of counsel where his appointed trial and appellate counsel also actively represented Christopher Burger's more culpable, adult co-defendant; (b) whether a death sentence may be constitutionally imposed based solely upon the aggravating circumstance set out in Ga. Code Ann. §27-2534.1(b)(7) ["the offense of murder was outrageously and wantonly vile, horrible or inhumane in that it involved torture, depravity of mind or an aggravated battery to the victim."].

WHEREFORE, based on this Application for Stay and the Petition for Writ of Certiorari previously docketed with this Court, Petitioner respectfully requests an order staying execution of his sentence of death pending disposition of his Petition for Writ of Certiorari.

Respectfully submitted,



Joseph M. Nursey
Millard C. Farmer

COUNSEL FOR PETITIONER

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 19th day of March, 1984.

Joseph M. Nursey
COUNSEL FOR CHRISTOPHER BURGER

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
FEB 27 1984
SPENCER D. MERCER
CLERK

No. 81-7419

CHRISTOPHER A. BURGER,

Plaintiff-Appellee,
Cross-Appellant,

versus

WALTER A. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Defendant-Appellant,
Cross-Appellee.

- - - - - - -

Appeal from the United States District Court for the
Southern District of Georgia

- - - - - - -

O R D E R:

IT IS ORDERED that the motion of appellee/cross-appellant for stay of mandate pending application for certiorari is Denied

UNITED STATES CIRCUIT JUDGE

APPENDIX A

MOT-6H

IN THE SUPERIOR COURT OF WAYNE COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA,	§	
-vs-	§	INDICTMENT 77-1641
CHRISTOPHER A. BURGER,	§	CHARGE: MURDER
DEFENDANT.	§	

AMENDED ORDER

The Supreme Court of Georgia having returned the remittitur in this case to the Superior Court of Wayne County, Georgia, on the 16th day of March, 1981, affirming the verdict and sentence of death; the trial jury having found the defendant guilty of murder and having fixed his punishment at death; subsequent thereto the abovesaid case was appealed to the Federal Court, Southern District of Georgia, Federal Judge Avant Edenfield presiding, who set the death penalty aside; this federal verdict was appealed by the State of Georgia, and same was reversed by the Federal Appellate Court; and the Federal Appellate Court affirmed the state trial court's verdict of guilty and sentence of death, remittitur of the Federal Appellate Court having been filed in the Southern District of Georgia on March 6, 1984.

IT IS ORDERED AND ADJUDGED by this Court that on March 27, 1984, the defendant, **CHRISTOPHER A. BURGER**, shall be executed by the Director of the State Department of Offender Rehabilitation, in the manner herein provided by law, at such penal institution as may be designated by said Director and witnessed only by the executing officer, defendant's relatives, counsel, and such friends and clergyman as he may desire.

IT IS SO ORDERED this 15th day of March, 1984.

Robert L. Scoggin
ROBERT L. SCOGGIN
SENIOR JUDGE, SUPERIOR COURTS
BRUNSWICK JUDICIAL CIRCUIT

FILED IN OFFICE THIS 15th
DAY OF March 1984
Faye D. Graham
CLERK Superior COURT
WAYNE COUNTY, GA

APPENDIX B

83-6413

Office - Supreme Court, U.S.
FILED
MAR 14 1984
ALEXANDER L. STEVAS
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHRISTOPHER BURGER,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

APPENDIX A

Opinion of Eleventh Circuit in Burger v. Zant

classification in § 4216 bears a rational relationship to that goal. Congress had to distinguish persons who are sufficiently young to benefit from the program from those who are not. Congress settled on the twenty-sixth birthday as the bright line limit and apparently concluded that age at the time of conviction is more important than age at the time of the offense for rehabilitation purposes. We see no equal protection problem in drawing the line where Congress did.

[2] Finally, relying upon *United States v. Rivera*, 427 F.Supp. 89 (S.D.N.Y.1977), Thompson apparently contends that by not applying the act to him the court deprived him of his rights to due process under the Fifth Amendment. In *Rivera*, the defendant entered his plea of guilty after his twenty-sixth birthday only because of an unusual delay after his arrest. The delay was attributable in part to the defendant's assertion of his constitutional rights and in part to circumstances beyond his control. To avoid constitutional problems, the *Rivera* court construed section 4216 as applying to the defendant's case. We do not determine whether we agree with the *Rivera* court, see *United States v. Riffe*, 600 F.2d 1146, 1147 (5th Cir.1979), because that case is readily distinguishable. In the instant case the defendant's twenty-sixth birthday occurred before his arrest, less than two months after his first unlawful possession of food stamps and more than six months before his plea of guilty. There is no indication either of improper delay or that Thompson could have entered his plea of guilty before his twenty-sixth birthday but for his having raised proper constitutional questions. Thus, we conclude that the trial court's application of 18 U.S.C. § 4216 to the instant case did not deprive the defendant of due process.

AFFIRMED.

Christopher A. BURGER, Plaintiff-Appellee, Cross-Appellant,

v.

Walter A. ZANT, Warden, Georgia Diagnostic and Classification Center, Defendant-Appellant, Cross-Appellee.

No. 81-7419.

United States Court of Appeals, Eleventh Circuit.

Oct. 13, 1983.

Rehearing and Rehearing En Banc Denied Feb. 13, 1984.

Defendant was convicted of murder, and on appeal, Georgia Supreme Court, 242 Ga. 28, 247 S.E.2d 834, affirmed conviction but vacated death sentence and remanded for resentencing. On remand, defendant was again sentenced to death, and Georgia Supreme Court, 245 Ga. 458, 265 S.E.2d 796, affirmed. After United States Supreme Court denied certiorari, defendant filed petition for writ of habeas corpus, and United States District Court for the Southern District of Georgia, B. Avant Edenfield, J., 513 F.Supp. 772, granted writ and vacated death sentence, and state appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) where one of three aggravating circumstances remained valid, fact that other two were reversed as erroneous did not render entire verdict invalid, and (2) death sentence may constitutionally be imposed under Georgia's aggravating circumstance that defendant's crime was, inter alia, outrageously or wantonly vile, horrible or inhuman in that it involved torture, based on finding that defendant inflicted either psychological or physical torture upon his victim.

Reversed and remanded.

Johnson, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐1208.1(5)

Where one of three aggravating circumstances remained valid, fact that other two were reversed did not render entire

verdict sentencing defendant to death invalid.

2. Habeas Corpus ⇐30(1)

Failure to object at resentencing hearing did not bar review of issue whether trial court erroneously instructed on aggravating circumstances, because state Supreme Court ruled on its merits, and because state waived procedural default by not raising it.

3. Criminal Law ⇐796

In instructing on aggravating circumstance that jury may impose death penalty if defendant's crime was, inter alia, outrageously or wantonly vile, trial court need not supply additional definitions or limiting instructions. O.C.G.A. § 17–10–30(b)(7).

4. Homicide ⇐340(4)

Although trial judge, in instructing on aggravating circumstance that offense of murder was, inter alia, outrageously or wantonly vile, did not expressly specify that jury could not find that a crime was "outrageously or wantonly vile, horrible or inhuman" without making a specific finding that it demonstrated "torture, depravity of mind, or an aggravated battery to the victim," jury returned verdict that clearly revealed its understanding that the two clauses were interrelated, and therefore trial court did not err in its instruction. O.C.G.A. § 17–10–30(b)(7).

5. Homicide ⇐340(4)

Trial court, in instructing on aggravating circumstance that offense of murder was, inter alia, outrageously or wantonly vile, did not err by failing to instruct that jury could not find "depravity of mind" without finding that defendant had tortured or physically abused victim before his death, because jury's verdict clearly linked "torture and depravity of mind." O.C.G.A. § 17–10–30(b)(7).

6. Criminal Law ⇐1208.1(5)

Death sentence may constitutionally be imposed under Georgia statutory aggravating circumstance, which provides for imposition of death sentence where defendant's crime was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to victim, based on finding that defendant inflicted either psychological or physical torture upon victim. O.C.G.A. § 17–10–30(b)(7).

William B. Hill, Jr., Asst. Atty. Gen., Atlanta, Ga., for defendant-appellant, cross-appellee.

Millard Farmer, Joe Nursey, Andrea I. Young, Pamela L.J. Arangno, Atlanta, Ga., for plaintiff-appellee, cross-appellant.

Appeal from the United States District Court for the Southern District of Georgia.

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, District Judge.

VANCE, Circuit Judge:

The state of Georgia appeals the district court's grant of a petition for a writ of habeas corpus setting aside the death sentence of Christopher Burger.

The facts in this case are set out in the district court's opinion. *Burger v. Zant*, 513 F.Supp. 772, 788–89 (S.D.Ga.1981). Briefly, Christopher Burger and Thomas Stevens, both soldiers at Fort Stewart, Georgia, were indicted for the murder of Roger Honeycutt, also a soldier. On September 4, 1977, Burger and Stevens decided to rob a taxicab driver. The victim, who supplemented his military income by driving a taxi, picked up the two men. Burger and Stevens threatened Honeycutt with knives, forced him to stop the cab and robbed him of sixteen dollars. The victim was placed in the back seat of the cab with Stevens. As Burger drove the vehicle, Stevens forced Honeycutt to disrobe and then to participate in acts of oral and anal sodomy. The victim, nude and bound, was then placed in the trunk of the cab.

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

With Honeycutt still in the trunk, Burger drove the cab to the local airport, where he and Stevens met a friend and fellow soldier, James Botsford. As they drove back to Fort Stewart, Burger and Stevens explained what they had done, confirming their story by exchanging remarks with Honeycutt in the trunk. After some discussion, Botsford convinced his friends to promise to release Honeycutt unharmed. They dropped Botsford off at the post.

Burger and Stevens then drove to a nearby "borrow pit" which was filled with water. After removing their fingerprints from the cab and removing its radio, Burger raised the trunk and asked Honeycutt if he was all right. Honeycutt responded affirmatively. Burger then closed the trunk, started the car and drove it into the pond, jumping out as it entered the water. The victim died by drowning.

Christopher Burger was convicted of murder and sentenced to death. Stevens was tried separately, convicted, and also sentenced to death. *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978). On direct appeal to the Georgia Supreme Court, Burger's conviction was affirmed but his death sentence was vacated and the case remanded for resentencing. *Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978).

On remand, Burger was once again sentenced to death and the sentence was affirmed by the Supreme Court of Georgia. *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980). The United States Supreme Court denied certiorari. 448 U.S. 913, 101 S.Ct. 31, 65 L.Ed.2d 1175 (1980).

After unsuccessfully exhausting available state post-conviction remedies, Burger filed a petition for a writ of habeas corpus in federal district court. The district judge granted the writ insofar as it vacated Burger's death sentence.

The state of Georgia as appellant and Burger as appellee/cross-appellant raise five issues before this court: whether Burger was denied effective assistance of counsel; whether the jury instructions impermissibly shifted the burden of proof onto the defendant; whether *Miranda* violations occurred; whether the district court properly vacated Burger's death sentence where the jury instructions concerning two of the three aggravating circumstances upon which it was based were insufficient; and whether the jury instruction on the aggravating circumstance set out in Ga.Code Ann. § 27-2534.1(b)(7) sufficiently channeled the discretion of the jury to impose the death sentence.[1] All of these questions were carefully analyzed in District Judge Edenfield's opinion. 513 F.Supp. at 788-803. As to the first three issues, we adopt Judge Edenfield's opinion as our own. The final two issues require discussion.

(1)

The *Stephens* Issue

Christopher Burger's sentencing jury based its death sentence upon three statutory aggravating circumstances: (a) the "offense of murder was committed while the offender was engaged in the commission of another capital felony, kidnapping"; (b) the "offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery"; (c) the offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." On direct review, the Georgia Supreme Court held that the trial court had erroneously failed to instruct the jury on the definitions of kidnapping and robbery. The Georgia Supreme Court upheld the death sentence, however, based on the single remaining aggravating circumstance. *Burger v. State*, 265 S.E.2d at 800.

The district court vacated Burger's death sentence, holding that the Supreme Court of Georgia's disposition of the first two aggravating circumstances rendered the entire verdict invalid. The district judge

1. In addition, Burger challenges the sufficiency of the evidentiary hearing conducted by the district court. This contention is patently frivolous. The most cursory examination of the district judge's opinion demonstrates the care with which he treated the case and the seriousness with which he regarded the issues raised by Burger.

based his decision on our opinion in *Stephens v. Zant*, 631 F.2d 397, *modified on panel rehearing*, 648 F.2d 446 (5th Cir. 1981),[2] and Burger and Georgia agree that *Stephens* controls this issue in the present case. Certiorari was granted in the United States Supreme Court in *Zant v. Stephens*, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981), *question certified to the Georgia Supreme Court*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222, *question answered*, 250 Ga. 97, 297 S.E.2d 1 (1982).

[1] On June 22, 1983, the United States Supreme Court decided *Zant v. Stephens*, —— U.S. ——, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), reversing the judgment rendered by a panel of the former fifth circuit. The Court held that under the Georgia capital punishment statute the invalidity of one of a plurality of statutory aggravating circumstances does not require that the entire death sentence be vacated. The Court found the death penalty in that case permissible because there were two remaining aggravating circumstances that "adequately differentiate[d that] case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed." *Id.* at ——, 103 S.Ct. at 2744. So long as "at least one of a plurality of aggravating circumstances found by the jury is valid and supported by the evidence," *Zant v. Stephens*, 456 U.S. 410, 414, 102 S.Ct. 1856, 1857, 72 L.Ed.2d 222 (1982), the death sentence may stand. We thus reverse the district court's order compelling resentencing based on our opinion in *Stephens*.

(2)

The *Godfrey* Issue

Burger also challenged the adequacy of the trial court's charge on the sole remaining aggravating circumstance that was applied in his case. Under Ga.Code Ann. § 17–10–30(b)(7), a jury may impose the death penalty if it finds that the defendant's crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Since "[i]t is, of course, arguable that any murder involves depravity of mind or an aggravated battery," *Gregg v. Georgia*, 428 U.S. 153, 201, 96 S.Ct. 2909, 2938, 49 L.Ed.2d 859 (1976), the potential subjectivity of § (b)(7) has made it the target of numerous constitutional challenges. Although the Supreme Court ruled that § (b)(7) was not unconstitutional on its face in *Gregg*, the Court conceded that the statutory language might be subject to abuse if the Georgia Supreme Court were to adopt "an open-ended construction" of its terms. *Id.* Four years later, the Court re-examined the operation of § (b)(7) in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and concluded that the Georgia courts had strayed from the straight and narrow path marked out in *Gregg*. In *Godfrey*, there was no allegation that the murders committed by the defendant involved either torture or an aggravated battery, and the sentencing jury based its imposition of the death penalty on the simple grounds "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." The Georgia Supreme Court upheld the sentence on review, but the Supreme Court reversed. Writing for a plurality of the Court, Justice Stewart held that the jury's findings were an insufficient basis for imposing the death penalty, because "nothing in these few words, standing alone ... implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Id.* at 428, 100 S.Ct. at 1765. Although Justice Stewart found that the Georgia Supreme Court in *Godfrey* had ignored its responsibility "to keep § (b)(7) within constitutional bounds," *id.* at 429, 100 S.Ct. at 1765, he noted that other decisions by that court had placed a limiting construction on the statute

2. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc) this circuit adopted as precedent all former fifth circuit cases submitted or decided prior to October 1, 1981. In *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir.1982), the court held that Unit B panel or en banc court decisions of the former fifth circuit also are binding precedent in the eleventh circuit.

that was sufficient to bring § (b)(7) within the ambit of constitutional acceptability:

> The *Harris* [*v. State*, 237 Ga. 718, 230 S.E.2d 1] and *Blake* [*v. State*, 239 Ga. 292, 236 S.E.2d 637] opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase, "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word, "torture," must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

Id. 446 U.S. at 431, 100 S.Ct. at 1766. As long as the Georgia courts observed these precedents, Justice Stewart suggested, death sentences imposed on the basis of § (b)(7) would meet the requirements of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[2, 3] In the present case, the trial judge charged the jury that one of the bases for imposing the death penalty was a finding "that the offense of murder was outrageously or wantonly vile, horrible or inhumane [sic] in that it involved torture and depravity of mind." Burger contends that this was insufficient to provide adequate guidance to the jury, and asserts that the trial court was required under *Godfrey* to explain and limit the meaning of § (b)(7) in accordance with the construction of the statutory language and Georgia case law presented by Justice Stewart in the plurality opinion.[3] The district court did not expressly address the issue of whether a limiting construction was required at the sentencing phase, but two recent decisions of this circuit have rejected the argument that *Godfrey* requires the trial court to supply additional definitions or a limiting instruction in its charge to the jury. *See Westbrook v. Zant*, 704 F.2d 1487, 1501, 1504 (11th Cir.1983); *Stanley v. Zant*, 697 F.2d 955, 971 (11th Cir.1983).

The facts of *Stanley* in particular have some similarity to those in this case. Ivon Ray Stanley and his codefendant robbed

3. We note in passing that Burger did not object to the (b)(7) instruction at the resentencing hearing. This does not bar review of the issue under the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), however, for either of two reasons. First, we address the issue because the Georgia Supreme Court ruled on its merits. *Burger v. State*, 265 S.E.2d at 799–800. This court recently observed that "[c]onsiderations of comity and federalism have resulted in the development of a well-settled exception to the procedural default rule of *Sykes*: where a state appellate court does not rely on a procedural default, but reaches the merits of the federal law claim, the *Sykes* bar is inapplicable." *Booker v. Wainwright*, 703 F.2d 1251, 1255 (11th Cir.1983). Because in the present case the Georgia Supreme Court "entertained the federal claims on the merits, a federal habeas court must also determine the merits of appellant's claim." *Lefkowitz v. Newsome*, 420 U.S. 283, 292 n. 9, 95 S.Ct. 886, 891 n. 9, 43 L.Ed.2d 196 (1975). *See also County Court v. Allen*, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979); *Francis v. Henderson*, 425 U.S. 536, 542 n. 5, 96 S.Ct. 1708, 1711 n. 5, 48 L.Ed.2d 149 (1976); *Westbrook v. Zant*, 704 F.2d 1487, 1491 n. 6 (11th Cir.1983); *Henry v. Wainwright*, 686 F.2d 311, 313 (5th Cir. Unit B 1982), *on remand from* 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982); *Machetti v. Linahan*, 679 F.2d 236, 238 n. 4 (11th Cir.1982); *Washington v. Watkins*, 655 F.2d 1346, 1368 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982); *Sasoon v. Stynchcombe*, 654 F.2d 371, 374 (5th Cir.1981); *Moran v. Estelle*, 607 F.2d 1140, 1142–43 (5th Cir.1979); *Cannon v. Alabama*, 558 F.2d 1211, 1216 n. 12 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978).

Second, the state has not raised the procedural default issue and thus it must be deemed waived. *See Goode v. Wainwright*, 704 F.2d 593, 596 n. 1, 612 n. 25 (11th Cir.1983); *Washington v. Watkins*, 655 F.2d at 1368; *Smith v. Estelle*, 602 F.2d 694, 708 n. 19 (5th Cir.1979), *aff'd*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1980); *LaRoche v. Wainwright*, 599 F.2d 722, 724 (5th Cir.1979). *Cf. Lamb v. Jernigan*, 683 F.2d 1332, 1335 n. 1 (11th Cir.1983) (state waives exhaustion requirement by failing to raise it).

their victim at gunpoint, then compelled him to accompany them to a wooded area where they beat and shot him before burying him alive. At the sentencing phase of Stanley's trial, the judge charged the jury in terms that were essentially identical to those employed by the trial court in the present case, instructing them that they could impose the death penalty if they found that Stanley's offenses were "outrageously and wantonly vile, horrible and inhuman, in that the offenses involved Defendant's depravity of mind and torture to the victim." *Stanley*, 697 F.2d at 971–72. The jury found that Stanley's offense "involved depravity of mind and torture to the victim" and sentenced him to death. *Id.* This court distinguished *Stanley* from *Godfrey* on the grounds that the charge used in the former (as well as in this case) required the jury to find that the crime involved both torture *and* depravity of mind, whereas the formulation used by the trial judge in *Godfrey* was phrased in the disjunctive language of the statute and permitted the jury to sentence the defendant to death on finding that the crime evidenced either torture or depravity of mind or an aggravated battery.[4] The jury's findings in *Godfrey* did not make it apparent which, if any, of these factors it had relied on in sentencing the defendant to death, and the absence of any evidence suggesting that the defendant had tortured or physically abused his victims before their deaths led Justice Stewart to conclude that there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey*, 446 U.S. at 433, 100 S.Ct. at 1767. In contrast, the instructions given the *Stanley* and *Burger* juries prevented them from imposing the death sentence unless they found that the victims had in fact been tortured before death. Since the jurors in each of these cases made an explicit finding that torture had occurred, we cannot say that their reasons for imposing the death penalty must remain "the subject of sheer speculation." *Id.* at 429, 100 S.Ct. at 1765. The only remaining questions are first, whether there was anything about the instructions as given that might have led the jurors to base their sentence on a mistaken interpretation of state law, *see Sandstrom v. Montana*, 442 U.S. 510, 517, 99 S.Ct. 2450, 2455–56, 61 L.Ed.2d 39 (1979), and second, whether the state law as applied in this case is constitutional.

[4, 5] Burger contends that the trial judge's instructions in his case were defective because they did not set forth Justice Stewart's construction of the Georgia law from *Godfrey*. With regard to the first two points in Justice Stewart's analysis, however, Burger's objections are easily disposed of. Although the trial judge did not expressly specify that the jury could not find that a crime was "outrageously or wantonly vile, horrible or inhuman" without making a specific finding that it demonstrated "torture, depravity of mind, or an aggravated battery to the victim," the jury in this case—unlike the jury in *Godfrey*—returned a verdict that clearly revealed its understanding that the two clauses were interrelated. Burger also contends that the jury should have been instructed that it could not find "depravity of mind" without finding that the defendant had tortured or physically abused the victim before his death. The trial judge in *Burger*, however, clearly linked "torture and depravity of

4. The Georgia Supreme Court has stressed the importance of the fact that § (b)(7) is worded in the disjunctive, rather than the conjunctive. Thus, "[i]t is not required that a trier of fact find the existence of each disjunctive phrase in the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute." *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316, 320 (1980). Although the trial judge's charge in *Godfrey* was therefore technically correct, the jury returned a report that did not specify which, if any, of the phrases in the second clause was the basis of its death sentence. In addition, the potential subjectivity of the phrase "depravity of mind" renders a death sentence that is based upon that phrase alone more suspect than one that is based on both "depravity of mind" and one of the other factors as well. *See* note 5 *infra*.

mind" in his instructions, and the jury's verdict did likewise.[5]

Burger's final objection to the trial court's charge is somewhat more troublesome. He asserts that the jury should have been instructed that the word "torture" assumes the existence of an aggravated battery and therefore requires evidence of serious physical abuse of the victim before death. In *Stanley* and *Westbrook*, this aspect of Justice Stewart's opinion was not problematic, since it was not disputed that in both of those cases the defendant had inflicted extreme physical abuse on his victim prior to the murder itself. *See Westbrook*, 704 F.2d at 1505 & n. 18; *Stanley*, 697 F.2d at 972. In dictum, however, the *Stanley* court reflected that "[arguably], the undefined word 'torture' [might] fall[ ] short of meeting the [*Godfrey*] test because in a given case a jury might understand it to mean mental torture rather than a word to be read *in pari materia* with 'aggravated battery' to require evidence of serious physical abuse." *Stanley*, 697 F.2d at 972. There was no contention in *Stanley* that "the torture to which his victim was subjected was anything other than physical," *id.*, but the situation in the present case is far less clear. In *Burger*, the jury might have viewed the evidence that was presented in a number of different ways. The jury found that Burger had tortured his victim, and the evidence supports a finding beyond a reasonable doubt that Honeycutt was tortured before he died. There was sufficient evidence from which the jury may properly have concluded that Burger aided and abetted his codefendant Stevens in physically torturing Honeycutt, as well as that he personally tortured Honeycutt both physically and psychologically. On the other hand, it is also conceivable that the jury may have found that while Stevens physically tortured Honeycutt, Burger inflicted only psychological torture on him.[6] This case therefore requires us to answer the question which we raised but did not resolve in *Stanley*: whether there is any significant distinction between mental or psychological and physical torture under either the law of Georgia or the Constitution. If the latter is within constitutional limits but the former is not, *Sandstrom* requires that the jury must receive instructions to this effect.

The deliberate infliction of mental anguish certainly comes within the commonly understood meaning of the word "torture," [7] and the sole support which Burger offers for his argument that the court should hold differently is the language of

5. Our consideration today does not reach the situation presented by a charge of depravity of mind not involving torture or aggravated battery. That question is obviously a more difficult one in the light of *Gregg* and *Godfrey*. *Cf. Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983) (section (b)(7) charge stated in the disjunctive held not to require instruction in excess of statutory language). Contrary to the conclusion of Justice Stewart in *Godfrey*, the Georgia Supreme Court in a line of cases extending well before that opinion has upheld findings of depravity of mind based on such factors as age of the victim, physical characteristics of the victim and mutilation, disfigurement or sexual abuse *after* death. *See Phillips v. State*, 250 Ga. 336, 297 S.E.2d 217 at 221.

6. The district court's correct analysis of the evidence is as follows:

> Of course, the present case involves many circumstances which may readily be seen as involving "torture" and reflecting "depravity of mind." There was ample evidence upon which the jury might have found that petitioner aided and abetted in Stevens' sodomizing the victim prior to his death. Serious sexual abuse has been equated with "torture" under Georgia law. *House v. State*, 232 Ga. 140, 205 S.E.2d 217 (1974). Similarly, serious physical abuse can readily be seen in the confining of the victim in the car trunk for a period of hours, bound, nude and certainly anxious in the extreme over his captors' intentions. Likewise, there can be little argument but that petitioner's sadistic inquiry into Private Honeycutt's condition prior to submerging the taxi well-demonstrated "depravity of mind" and, further, that the victim's horror as the trunk inexorably filled amounted to "torture."

513 F.Supp. 796–99.

7. In pertinent part, the definition of torture provided by *Webster's New Collegiate Dictionary* is as follows:

> 1: the infliction of intense pain (as from burning, crushing, or wounding) to punish, coerce, or afford sadistic pleasure 2a: anguish of body or mind: agony b: something that causes agony or pain.

Justice Stewart's plurality opinion in *Godfrey*. As an initial matter, it is important to emphasize that the *Godfrey* plurality's reversal of the death sentences imposed in his case ultimately stemmed not from its dissatisfaction with the jury instructions, but from its belief that the Georgia Supreme Court had failed to carry out its place in the statutory scheme given conditional approval in *Gregg*.

> In past cases the State Supreme Court has apparently understood this obligation of carrying with it the responsibility to keep § (b)(7) within constitutional bounds .... Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the [statute].

446 U.S. at 429, 432, 100 S.Ct. at 1765, 1767. Thus, the key inquiry in the minds of the *Godfrey* plurality was whether the Georgia Supreme Court had kept faith with its own expressed standards in reviewing the defendant's sentences of death. Justice Stewart found that it had not done so in *Godfrey*, basing this view on his construction of the Georgia statute and case law. He noted, however, that his research was limited to cases pre-dating 1978, and he conceded that the third of the "separate but consistent conclusions" which he deduced from the Georgia case law—the requirement that torture be construed *in pari materia* with "aggravated battery"—was derived from a single decision, *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977). The basis for Justice Stewart's conclusion was apparently the Georgia Supreme Court's statement that it "[c]onsider[ed] torture and aggravated battery on the one hand *as substantially similar treatment* of the victim and depravity of mind on the other hand as relating to the defendant ...." 236 S.E.2d 643 (emphasis added).

Although Justice Stewart's construction of the Georgia law on this point was strongly criticized at the time, *see, e.g., Godfrey*, 446 U.S. at 435–36, 100 S.Ct. at 1768–69 (Marshall, J., concurring in the judgment); 446 U.S. at 443, 100 S.Ct. at 1772–73 (Burger, C.J., dissenting); Donohue, *Godfrey v. Georgia: Creative Federalism, the Eighth Amendment, and the Evolving Law of Death*, 30 *Cath.U.L.Rev.* 13, 44–47 (1980), the Georgia Supreme Court subsequently affirmed its adherence to his construction in *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980), where the court noted that "[t]orture occurs when the victim is subjected to serious physical abuse before death." 268 S.E.2d at 345. The *Hance* court went on, however, to embrace an expansive definition of the term "serious physical abuse":

> Serious sexual abuse may be found to constitute serious physical abuse. [citation omitted] Torture also occurs when the victim is subjected to an aggravated battery as hereinabove defined. Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant.

Id. Subsequent decisions by Georgia's highest court have reaffirmed its interpretation of "physical abuse" as including both sexual and psychological abuse as well. *See, e.g., Phillips v. State*, 250 Ga. 336, 297 S.E.2d 217, 221 (1982); *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, 58 (1981).

Since the Georgia law therefore follows common usage in finding that the deliberate infliction of mental anguish constitutes "torture," we conclude that the trial court's failure to elaborate or define the term further does not run afoul of the rule in *Sandstrom*. In meaningful contrast to the more amorphous term "depravity of mind," "torture" has a readily understandable and generally understood meaning. This excludes a reasonable risk that the jury might give it an unintended interpretation.

We see no basis for concluding that the definition of "torture" applied by the Georgia courts violates substantive federal constitutional guarantees. The central theme

of the Supreme Court's death penalty jurisprudence has always been that the states must draft and apply their capital punishment laws in a manner that "genuinely narrow[s] the class of persons eligible for the death penalty," *Zant v. Stephens*, —— U.S. at ——, 103 S.Ct. at 2742–43, thereby providing a "principled basis for distinguishing [a] case, in which the death penalty [is] imposed, from the many in which it [is] not." *Godfrey*, 446 U.S. at 433, 100 S.Ct. at 1767. The Georgia Supreme Court has recently demonstrated that it will not allow the category of psychological abuse to become all-inclusive.[8] In *Phillips v. State*, *supra*, the court emphasized that a finding of "serious psychological abuse" required a showing that "the defendant inflicted deliberate, offensive and prolonged pain on his victim prior to death." 297 S.E.2d at 221. Thus, "the mere apprehension of death, immediately before the fatal wounds are inflicted" was found insufficient to justify a finding of "torture" under § (b)(7). *Id.*

[6] We therefore decide that a death sentence may constitutionally be imposed under § (b)(7) based on a finding that the defendant inflicted either psychological or physical torture upon his victim. We can discern no principled basis for attempting to distinguish the two, and it seems highly questionable that Justice Stewart meant to draw such a distinction in *Godfrey*. The standards applied by the Georgia courts certainly restrict the class of persons eligible for the death penalty by reason of the "torture" provision of § (b)(7), and the facts of this case easily place it within the core of those the statute was designed to reach. Burger's contentions must therefore be rejected.

Having concluded that both phases of Burger's trial are free of constitutional error, we reverse the judgment of the district court and remand with instructions that the writ be denied.

REVERSED and REMANDED.

8. Here, of course, as in *Zant v. Stephens*, our decision "depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." —— U.S. at ——, 103 S.Ct. at 2749.

JOHNSON, Circuit Judge, dissenting:

I concur in the majority's opinion except that, for the following reasons, I dissent from that part of the opinion adopting the district court's opinion and order, 513 F.Supp. at 795–98, denying Burger's petition for habeas corpus relief on the grounds that he was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments at both of his state court trials and on appeal to the Supreme Court of Georgia. A review of the record reveals that Burger was denied the effective assistance of counsel both by his appointed counsel's active representation of his co-indictee's conflicting interest and by his counsel's failure to present any evidence in mitigation at either of his two sentencing proceedings.

A review of the general principles applicable to all ineffective assistance of counsel claims is in order. The Sixth Amendment guarantees a criminal defendant the right to "*effective* assistance of counsel, that is, counsel reasonably likely to render and rendering effective assistance." *Washington v. Strickland*, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982) (en banc), *cert. granted*, —— U.S. ——, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). The appropriate methodology for determining whether there has been effective assistance of counsel is to examine the totality of circumstances in the record. *Baty v. Balkcom*, 661 F.2d 391, 394 (5th Cir. Unit B 1981). Although neither in capital nor in noncapital cases is defendant entitled to error-free counsel, the "number, nature and seriousness of the charges against the defendant are all part of the 'totality of the circumstances in the entire record' that must be considered in the effective assistance calculus." *Washington v. Watkins*, 655 F.2d 1346, 1357 (5th Cir.1981).

Turning first to Burger's conflict of interest claim, in order to establish the constitutional predicate for ineffective assistance

Burger must show that his counsel actively represented actually conflicting interests. *Cuyler v. Sullivan*, 446 U.S. 335, 349–50, 100 S.Ct. 1708, 1718–19, 64 L.Ed.2d 333 (1980); *Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir.1983). Applying this standard to the facts of this case, the record is clear that Burger's counsel was actively representing both Burger and his co-indictee Stevens and that an actual conflict of interest between the two violated Burger's right to the effective assistance of counsel.[1]

First, it is apparent that Burger's counsel actively represented both Burger and Stevens. Both Burger and Stevens were charged with and indicted for the murder of Roger Honeycutt. Both Burger and Stevens were appointed counsel by the trial court at approximately the same time, and within a few weeks after they had been charged with the crime. Burger's appointed counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. Leaphart testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. Leaphart and Smith discussed the issues involved in each case and researched the law together. Smith sat at counsel table and assisted Leaphart during Burger's trial. Although not physically present at Stevens' trial, Leaphart testified that "I worked then with—discussed the issues with Bob [Smith]. We researched the law together."[2] Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he "primarily" prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court of Georgia.[3] The fee received by each attorney for representing each client was deposited in the law firm's corporate account. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest.

Whether analyzed as a situation where one attorney, Leaphart, represented both Burger and Stevens,[4] or where one law firm represented both Burger and Stevens,[5] the

1. The Sixth Amendment guarantee of effective assistance of counsel necessarily includes the guarantee of conflict-free counsel. *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 464–65, 86 L.Ed. 680 (1942); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir.1978).

2. Transcript of Federal Habeas Corpus Hearing ("THC") at 18.

3. THC at 40–41.

4. The warden-appellant argues that the conflict of interest cases relied upon by Burger are inapposite as involving the representation of multiple defendants by one attorney. Here, appellant contends, Burger and Stevens were represented by "separate" attorneys. This argument is contrary to the facts as reflected by the record. Leaving aside the fact that Leaphart and Smith were partners in the practice of law, the attorneys here were each active in the defense of the other's client and "seem to have viewed themselves as a defense 'team' acting on behalf of [both] of the accused." *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512, 515 (3d Cir.1979), *rev'd on other grounds*, *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Leaphart consulted confidentially with Stevens, aided in preparing his case for trial, and prepared the briefs for both of his appeals. "Whatever may have been the extent of each attorney's participation in the trial of the . . . defendants, we are satisfied that it was sufficient to establish that both attorneys represented [both] defendants." *Id.*

5. "The same principles [governing Sixth Amendment conflict of interest claims] apply where the joint representation is by two members of the same firm." *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir.1980) (*quoting United States v. Helton*, 471 F.Supp. 397, 399 n. 1 (S.D.N.Y.1979)); *see also United States v. Donahue*, 560 F.2d 1039, 1042 (1st Cir.1977) ("[t]he same rule applies with equal force to representation of two or more defendants by members of the same law firm."). *Cf. Zuck v. Alabama*, 588 F.2d 436, 438 (5th Cir.1979) (ineffective assistance found where "[t]he law firm which served as counsel to Zuck in his murder trial also represented, in an unrelated civil matter, the state prosecutor who tried Zuck."); Fed.R.Crim.Pro. 44(c) ("[w]henever two or more defendants have been jointly charged . . . and are represented by . . . retained or appointed counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including

end result on these facts is the same: Leaphart was actively involved in the defense of both to the extent that a conflict of interest was clearly established.

Although multiple representation is the paradigm context in which conflict of interest claims arise,[6] a finding of multiple representation alone does not establish ineffective assistance of counsel. *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir.1975). The conflict must be shown to be actual, not speculative, before it will cause representation to fail Sixth Amendment standards. *Baty v. Balkcom*, 661 F.2d at 397. "An actual conflict of interest occurs when a defense attorney places himself in a situation 'inherently conducive to divided loyalties.' " *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir.1979) (*quoting Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir.1974)); *see also Baty v. Balkcom*, 661 F.2d at 397 ("[a]n actual conflict of interest exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing.").

In this case, the fundamental issue, as perceived by counsel, was not that of guilt, but of culpability. Upon the habeas corpus hearing Leaphart testified at length concerning the evidence supporting Burger's lesser degree of culpability for the murder as compared to Stevens'.[7] Summarized, the evidence was that at the time the crime was committed Burger was seventeen; Stevens was twenty. Burger has an I.Q. of 82 and possible brain damage. Stevens appeared to be the leader in their relationship; Burger the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In such a situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense, damage Stevens. An actual conflict of interest between Burger and Stevens is thus apparent. Stated differently, Burger's interests were drastically adverse to those of Stevens.

> If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict of interest exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.
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> *Zuck v. Alabama*, 588 F.2d at 439.

The course of Burger's state court proceedings illuminates the duty owed him by Leaphart to take actions that could be detrimental to Stevens. First, Leaphart did not at any time in his representation of

separate representation."), *construed in Ross v. Heyne*, 638 F.2d at 983 ("[t]he Supreme Court's proposal of this rule indicates its recognition that the potential constitutional problems attendant to multiple representation are present when different attorneys from the same legal partnership represent co-defendants with conflicting interests."); *ABA Code of Professional Responsibility* DR 5-105(D). Further, the Supreme Court of Georgia, exercising its supervisory role over the Bar, has adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. *Fleming v. State*, 264 Ga. 90, 270 S.E.2d 185 (1980). This rule applies with equal force to representation by a single attorney or by members of the same law firm. *Id.* at 188 n. 7.

6. *See Cuyler v. Sullivan*, 446 U.S. at 348, 100 S.Ct. at 1718 ("[a] possible conflict of interest inheres in almost every instance of multiple representation"); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir.1978).

7. THC at 20–23.

Burger offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger.[8] *See Baty v. Balkcom*, 661 F.2d at 397 n. 12 ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); *see also Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, 189 (1980) (Bowles, J., concurring) ("[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining."). Second, at Burger's trial Stevens was not called as a witness by the defense. If Stevens had been called by the state, Leaphart would have been placed in the untenable position of cross-examining his own client. Finally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less culpable party, although the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." O.C.G.A. § 17–10–35(c)(3) (1982), formerly Ga.Code Ann. § 27–2537(c)(3) (1933).

Once an actual conflict of interest is shown, without further inquiry, prejudice to the defendant is presumed. *Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir.1983). "It is well established that when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances, the error cannot be considered harmless." *Baty v. Balkcom*, 661 F.2d at 395 (*quoting Turnquest v. Wainwright*, 651 F.2d 331, 334 (5th Cir.1981)). The rationale for dispensing with the requirement of a showing of prejudice in conflict of interest cases "becomes apparent when one considers the nigh impossible task of making a meaningful qualitative analysis of trial counsel proficiency, in a case involving divided loyalties, from an examination of the transcript alone." *Johnson v. Hopper*, 639 F.2d 236, 239 (5th Cir. Unit B 1981). The degree to which counsel's strategic decisions and performance throughout the course of his representation are affected by an actual conflict of interest subtly pervading the whole of the defense may not be manifested in his conduct at trial alone. "[T]he sixth amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. The fact that a particular lawyer may actually resist the temptation is of no moment." *Zuck v. Alabama*, 588 F.2d at 440.

In light of this precedent it is clear that the presumption of prejudice arising from an actual conflict of interest cannot be overcome by evidence that counsel did, in fact, vigorously pursue one client's defense to the detriment of the other at trial. Although the factual content of the extraordinary circumstances in which the error of representing actually conflicting interests is considered harmless has not been delineated by this Court, it is apparent that a showing

8. At the federal habeas hearing, Leaphart testified that he had not, at any time during his representation of Burger, discussed with the district attorney the possibility of Burger's testifying against Stevens in return for a lighter sentence. THC at 38–39. When further questioned about plea negotiations in Burger's case, Leaphart testified that he had engaged in plea negotiations, but that "*during the first trial* [the district attorney] refused to discuss it in any terms." THC at 65 (emphasis supplied). From this account, it appears that plea negotiations were entered into in this case; that Leaphart never offered Burger's testimony against Stevens; and that, after Burger's first trial had begun, the district attorney refused to discuss a plea on whatever terms Leaphart had offered, presumably not the terms of Burger's testifying against Stevens since Leaphart testified he did not at any time make such an offer. Thus, appellant's argument that no *pretrial* conflict of interest could have arisen due to the district attorney's refusal to plea bargain is contradicted by the record.

of no adverse effect upon counsel's performance at trial or no impairment of his client's defense does not constitute such a circumstance.

Thus, accepting the district court's findings, those findings having been adopted by the majority in this case, that Leaphart "in no way tailored his strategy toward protecting Stevens" at Burger's trial, and that the trial record "shows considerable effort to gain mercy for petitioner by portraying Stevens as the chief architect of the crime," the presumption of prejudice from the actual conflict of interest between Burger and Stevens remains. Further, the actual conflict of interest between Stevens and Burger was not limited to Burger's trial, but permeated the entire course of Burger's state court proceedings. Once Burger established that an actual conflict of interest was present, whether at pretrial plea negotiations, trial or on appeal, and that his counsel actively represented both interests, his claim of ineffective assistance of counsel was complete.

I turn now to Burger's claim that he was denied the effective assistance of counsel because his counsel failed to present *any* evidence in mitigation, or otherwise, at either of his two sentencing proceedings. In *Stanley v. Zant*, 697 F.2d 955, 962 (11th Cir.1983), this Court rejected a claim that failure to present any mitigating evidence at the sentencing proceeding in addition to that presented at the guilt phase of the trial constituted per se ineffective assistance of counsel. Although, unlike Stanley's attorney, Burger's attorney did not present *any* evidence during either the guilt or two sentencing phases, it is not necessary to articulate a per se rule of ineffectiveness in this case as "application of general principles governing effectiveness of counsel to the specific context of a capital sentencing proceeding," *id.*, demonstrates the ineffectiveness of Burger's counsel.

Counsel's duty of effective representation continues into the sentencing phase of his client's trial. *King v. Strickland*, 714 F.2d 1481, at 1491 (11th Cir.1983).

> The sentencing phase of any case regardless of the potential punishment, is 'the time at which for many defendants the most important services of the entire proceedings can be performed.' ABA Standard on Criminal Justice, Sentencing Alternatives and Procedures § 5.3(e). The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial. *Stanley v. Zant*, 697 F.2d at 963.

"At the heart of the duty of effective representation is the independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir.1982). In *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982), the en banc court delineated the content of this duty to investigate:

> A strategy chosen without the benefit of a reasonably substantial investigation into all plausible lines of defense is generally based upon counsel's professional assumptions regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions counsel need not investigate lines of defense that he has chosen not to employ at trial.
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> In sum, an attorney who makes a strategic choice to channel his investigation into fewer than all plausible lines of defense is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable. *Id.* at 1255, 1256 (footnotes omitted).

"An attorney may proceed absent a reasonable investigation into all potential lines of defense, but he does so at his peril." *Stanley v. Zant*, 697 F.2d at 966. Finally, once a showing of ineffective assistance of counsel due to counsel's failure to investigate has been made, the second prong of *Washington*

v. *Strickland* requires that prejudice from this error be demonstrated. *Id.* at 1258.

The district court found that Leaphart's investigation into available mitigating evidence consisted solely of conversations with Burger's mother. Although it is unclear what the content of those conversations, as relating to mitigating evidence concerning Burger's background outside of Wayne County, Georgia, and the identity of possible character witnesses, was found to be, the district court concluded that Leaphart made "adequate if hardly ideal inquiries," and that his "investigation appears to meet at least minimal professional standards." Clearly by no stretch of the imagination could Leaphart's investigation be characterized as reasonably substantial. Since Leaphart failed to conduct a reasonably substantial investigation into available mitigating evidence, in order to be effective his choice not to investigate must have been a reasonable strategic decision based upon reasonable assumptions. Three reasonable assumptions on which Leaphart's strategy not to substantially investigate available mitigating evidence have been proffered: 1) that Leaphart's theory of defense, or strategy, was to make the state prove its case; 2) that, if mitigating evidence had been offered at Burger's sentencing proceedings, Leaphart would have lost the right to opening and closing argument; and 3) that Leaphart chose to rely in closing on the argument that Burger had never been in trouble before, an argument which would have been undercut by an investigation into Burger's background. None of these strategies, and the assumptions on which they are based, withstand scrutiny for reasonableness.

Leaphart testified concerning his strategy or theory of defense in Burger's case:

> Well, of course, my theory of defense was of course trying to make the District Attorney prove his case. And my theory of defense was to—well, that in effect, in essence what it was. And, use whatever rules of evidence and to prevent him from doing so.[9]

And, specifically concerning the second trial solely on the issue of penalty, Leaphart again testified that he "[f]elt that case should have been tried on the facts and make the District Attorney—I say make him, use whatever rules of evidence to exclude those harmful facts." [10] The law provides that the state must prove its case, whether defense counsel is present or not. Relying on the state's case is not a "strategy" for the defense, but instead reflects an abandonment of counsel's obligation to develop a case for his client. This proffered strategy is tantamount to no strategy at all, and reliance on such a strategy, especially in the context of a capital sentencing proceeding, as an alternative to substantially investigating available mitigating evidence is patently unreasonable.

Second, Leaphart testified that he made a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments. Again, the basic assumption on which this strategy was based is patently unreasonable. O.C.G.A. § 17-10-2(a) & (c) (1982), formerly Ga.Code Ann. § 27-2503(a) & (c) (1933), provide for the conduct of sentencing proceedings in capital cases: "The district attorney shall open and the defendant or his counsel shall conclude the argument." The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and defense closed final arguments to the jury. Leaphart simply failed to inform himself of basic Georgia criminal procedure in sentencing proceedings. *Cf. Young v. Zant*, 677 F.2d 792 (11th Cir.1982). No strategy based on such a false assumption is reasonable. The district court clearly erred in concluding otherwise.

The district court found that Leaphart's failure to substantially investigate available

9. THC at 18.

10. THC at 52.

mitigating evidence was based on a strategic choice to rely in closing argument on the "major argument" in Burger's behalf that he had no prior record of violent crime and had never been in trouble before. As it relates to Burger's second sentencing proceeding, this finding is contradicted by the record: at no point in his closing argument did Leaphart mention the lack of evidence that Burger had a record or had been in trouble before. Instead, Leaphart's closing argument at the second sentencing proceeding argued Burger's lack of culpability as compared to Stevens', and concluded with the plea for mercy. Neither argument would have been undercut by the presentation of humanizing evidence concerning Burger's background.

In conclusion, Leaphart's decision not to substantially investigate available mitigating evidence was not a reasonable strategic choice, and thus his failure to investigate constituted ineffective assistance of counsel.

The inquiry does not end with a finding of ineffective assistance. Burger may prevail only if he shows both a denial of effective assistance and actual prejudice to the course of his defense. *Washington v. Strickland*, 693 F.2d at 1258. Under any standard, in this case prejudice is apparent. *See Douglas v. Wainwright*, 714 F.2d 1532 at 1556–58 (11th Cir.1983).

At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. Summarized, this evidence was that Burger's parents had been married when his mother was fourteen and his father was sixteen. His parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent shuffled between the two. His father threw him out of the house; his mother sent him back to live with his father. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence; Burger's stepfather involved him in drugs and alcohol when he was eleven years old. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hitchhiked to Florida to live with his mother, selling his shoes to buy food along the way. When Burger arrived barefoot in Florida his stepfather told him he could not stay with them. Burger's mother told the juvenile authorities that she didn't want him, and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. Burger was taken in by a neighbor, as he had nowhere else to go. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.

It is absolutely astounding to me that none of this evidence was ever presented to Burger's juries. The district court found that although the affidavits of the character witnesses supplied by Burger at the hearing do "contain references to a difficult childhood which might have created some sympathy for Mr. Burger," they also contained references to drug abuse, juvenile probation and violence. However, the thrust of the character testimony offered by Burger was not what Leaphart assumed without investigating, that Burger was a good boy and went to church, but that Burger's personality and motivation could be explained by his stormy and unhappy childhood. Although this is precisely the kind of humanizing evidence that "may make a critical difference, especially in a capital case," Leaphart failed to make a substantial investigation into its use. *Stanley v. Zant*, 697 F.2d at 969. Leaphart testified that "[I] did not have any knowledge of any witnesses that—potential witnesses that I thought would have benefited him. Had I known or had knowledge of any, I would—certainly would have used them."[11] The prejudice to Burger from counsel's failure to substantially investigate available mitigating evidence and present it

11. THC at 44.

at either of his capital sentencing proceedings lies in the alternative chosen by counsel: to present no evidence at all. On the basis of the state's case alone, two sentencing juries recommended the death penalty.

Failure to present this substantial, available mitigating evidence meets the prejudice prong of *Washington v. Strickland*, 693 F.2d at 1263–62, showing that "the petitioner suffered actual and substantial detriment to the conduct of his defense."

For these reasons, I would REVERSE the district court's finding that Burger was afforded the effective assistance of counsel during his state court proceedings and REMAND this case to the state court for a trial with Burger being represented by conflict-free and competent counsel.

Darlene R. WHITE, individually and on behalf of the class, Plaintiff-Appellant,

v.

I.T.T., a Corporation; International Telephone and Telegraph Corporation; XYZ Corporation, d/b/a I.T.T., et al., Defendants-Appellees.

No. 81-8000.

United States Court of Appeals, Eleventh Circuit.

Oct. 31, 1983.

Rehearing and Rehearing En Banc Denied Dec. 12, 1983.

Former employee sought to recover money damages for alleged breach of employment contract and fraud. Prior to trial, employee's application to maintain suit as class action was denied. At trial, the United States District Court for the Middle District of Georgia, at Columbus, J. Robert Elliott, J., directed verdict for one defendant and, following jury verdict against other defendant, entered judgment notwithstanding the verdict. Employee appealed. The Court of Appeals held that: (1) absent any evidence that employment was for definite duration, employee was terminable at will and had no claim against employer for breach of employment contract; (2) the contract claim being unenforceable, employer's purported promise to rehire employee could not form basis of fraud claim; and (3) dismissal, without elaboration, of class action claims for asserted failure to satisfy prerequisites of rule required remand for further proceedings on that issue.

Affirmed in part, and remanded in part.

1. Master and Servant ⇐20, 36

Under Georgia law, absent any evidence that employment was for definite duration, employee was terminable at will; thus, employer owed no enforceable duty to retain employee and employee had no claim against employer for breach of any employment contract. O.C.G.A. § 34-7-1.

2. Master and Servant ⇐20

Under Georgia law, hiring indefinite as to time is terminable at will of either party and creates no executory obligations. O.C.G.A. § 34-7-1.

3. Fraud ⇐12

Under Georgia law, if promise is unenforceable it cannot form basis of fraud claim.

4. Fraud ⇐12

Since employer's promise to rehire terminable-at-will employee after maternity leave was unenforceable under Georgia law, such promise could not form basis of fraud claims against employer either. O.C.G.A. § 34-7-1.

5. Federal Courts ⇐946

Where district court dismissed, without elaboration, employee's class action claims due to asserted failure to satisfy prerequisites of federal rule, and, after employee lost individual claim at trial, she appealed dismissal of class action, case would be remanded to the district court to determine presence of live controversy involving pro-

APPENDIX B

Order of Eleventh Circuit denying rehearing *en banc*

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
FEB 13 1984
SPENCER D. MERCER
CLERK

No. 81-7419

CHRISTOPHER A. BURGER,

Respondent,
Cross-Petitioner,

versus

WALTER A. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,
Cross-Respondent.

- - - - - - - - - - - - -

Appeal from the United States District Court for the
Southern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 13, 11 Cir., 1983, _____F.2d_____).

(February 13, 1984)

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD*, Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation

APPENDIX C

Relevant Georgia Statutory Provisions

Ga. Code Ann. §26-1101(a)

[OCGA §16-5-1(a)]

16-5-1. Murder; felony murder.

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

Ga. Code Ann. §27-2534

[OCGA §17-10-30]

17-10-30. Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or another thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated batter to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed. (Code 1933, §27-2534.1, enacted by Ga. L. 1973, p. 159, §3.)

APPENDIX D

Guilt/Innocence Phase Jury Instructions

IN THE SUPERIOR COURT OF WAYNE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	INDICTMENT NUMBER 77-1641
	*	OFFENSE OF MURDER
-vs-	*	HONORABLE ROBERT L. SCOGGIN, Judge Presiding, and a JURY
CHRISTOPHER A. BURGER	*	JANUARY TERM, 1978 January 23rd and 24th, 1978.

CHARGE OF THE COURT

Ladies and gentlemen of the jury, the defendant, Christopher A. Burger, in this case, was indicted by a Grand Jury of Wayne County, Georgia at the November Term, 1977 of Wayne Superior Court. He is charged as follows:

"The Grand Jurors chosen and sworn for the County of Wayne, in the name and behalf of the citizens of Georgia, charge and accuse Christopher A. Burger and another named individual with the offense of murder for that the said Christopher A. Burger and another named individual on the 5th day of September in the year of our Lord, Nineteen Hundred and Seventy-seven, in the county aforesaid, did then and there unlawfully, wrongfully, feloniously, and with malice aforethought, kill and murder one Roger E. Honeycutt, a human being, by drowning the said Roger E. Honeycutt, all of said act being contrary to the laws of said State, the good order, peace and dignity thereof."

I will tell you now that you will disregard the other named individual entirely, and consider the case as to

Christopher A. Burger only.

I charge you that neither the language contained in this indictment nor its return by a Grand Jury of this County constitutes any proof as to the guilt of the accused, Charles A. Burger, in this case. He has entered a plea of not guilty, and I charge you that his plea of not guilty does note constitute any proof of his innocence in the case. The indictment, the language contained in the indictment, the charge contained in the indictment, and the plea of not guilty entered by the defendant do form the issue which you are to try and determine by your verdict.

I charge you that the defendant enters upon the trial of this case with the presumption of innocence in his favor and that presumption remains with him throughout the trial and until and unless the State shall introduce sufficient evidence in your presence and hearing to convince your minds beyond a reasonable doubt as to his guilt.

Now, a reasonable doubt, ladies and gentlemen, means just what it says. It is a doubt of a fair-minded, impartial juror, acting under the sanctity of your oath, honestly seeking the truth. It is not an arbitrary or a capricious doubt, but it is a doubt arising from a consideration of the evidence or from a lack of the evidence or from a conflict in the evidence. If, after considering all the facts and circumstances of this case, your minds are waivering, unsettled, and unsatisfied, then that is the doubt of the law and you should acquit this defendant.

However, if that doubt does not exist in your minds as to his guilt, then you whould convict the defendant.

I charge you further, ladies and gentlemen, that you are the judges of both the law and the facts in criminal cases, and this is a criminal case. The law you take from the Court as given you in charge, and the facts you get from the witnesses who testified, and from the evidence admitted as exhibits, State's Number "1" through whatever number were introduced.

I charge you further, ladies and gentlemen, that you are made the exclusive judges and the sole judges as to the credibility or believability of all the witnesses who appeared and testified in this case. And, in passing upon their credibility or believability, you may consider the witnesses' manner of testifying upon the witness stand, their interest or lack of interest, their means and opportunity for knowing about the facts to which they testified, their reasonableness or unreasonableness of their testimony, their prejudice or bias, if any should appear in the case, and you have the right to consider the personal credibility of the witnesses insofar as the same may legitimately appear upon the trial of this case.

Now, the Court did allow into evidence testimony by the Military CID special agents and by Deputy Sheriff Johnny Shuman relative to certain statements that may have been made by this defendant, Charles A. Burger - or Christopher A. Burger. And, before you consider this as

evidence for any purpose you must first decide two questions.

First, was the defendant warned of his constitutional rights, and did he clearly understand and knowingly give up such rights? And second, was any statement he may have made, clearly made made voluntarily and freely?

The rights which must be explained and which must be understood and given by the defendant before any statement is taken by the police, military police or civilian police, are as follows:

That he, the defendant, Christopher A. Burger, had a right to remain silent.

That if he chose not to remain silent, anything he said or signed could be used as evidence against him in Court.

That he had a right to consult a lawyer before any questioning, and to have the lawyer present with him at all times during any questioning, and that if he did not have the money for a lawyer, a lawyer would be provided for him by the State, to represent him, before any questioning and to be present with him during any questioning.

To be admissible, any statement made by Christopher A. Burger must have been freely and voluntarily made, and willingly given, with complete understanding and without any threats or fears, or violence or injury, or even a suggestion of any promise of leniency or reward. A statement induced by the slightest hope of benefit or the remotest fear of injury is not voluntary. To be voluntary, a statement must be the product of a free will and not under compulsion or

or any necessity imposed by others.

The burden of proof is upon the State to establish that the warning of all these rights mentioned to you were given, that they were clearly understood and knowingly given up by this defendant, and that the statement was voluntarily and freely and willingly made.

Now, if you find that all of the warnings as to his constitutional rights were given, that the defendant did clearly understand the meaning of what was said, and that he knowingly gave up such rights, and if you further find that any statement he may have made was freely and voluntarily made, then you will consider it as evidence, and you will apply the general rules for testing the believability of witnesses and decide what weight, if any, you give to any part of such evidence. However, if you fail to find any one of the conditions which I have just described to you, you must disregard the statement entirely and give it no consideration in reaching your verdict.

You should consider with great caution the evidence of any admission, statement or incriminatory statements made by this defendant. In weighing such evidence, you should consider whether the statement was made by this defendant, whether it was truthful, whether it was accurately repeated by witnesses here before you, whether this defendant understood what was said, the circumstances under which it was made, the emotions of hope or fear that may have existed, if any.

You, the jury, may believe admissions or incriminatory statements in whole or in part, believing that which you find to be true, and rejecting that which you find to be untrue. Upon you alone rests the duty to apply the general rules for testing the believability of witnesses and to decide what weight should be given to all or any part of such evidence.

I charge you further, ladies and gentlemen, that in considering the evidence in this case and the testimony in the case, if you find there are conflicts in the evidence about material matters, it becomes your duty to reconcile such conflicts, if you can, without imputing perjury to any witness; the law presuming that all witnesses tell the truth until the contrary is made to appear from the evidence.

If, however, after an honest effort to reconcile such conflict, if you find there are conflicts, you still cannot do so, it then becomes your duty to believe that witness or those witnesses whom you think are most entitled to credit and belief.

Now, the object ofall legal investigation is the discovery of the truth. Direct evidence is that which points immediately to the question at issue. Indirect or circumstantial evidence is that which tends to establish the question at issue, by proof of various facts and circumstances sustaining by their consistency, the hypothesis claimed.

I charge you that moral and reasonable certainty is all that can be expected in a legal investigation. And, whether

dependent upon direct or circumstantial evidence, the true question is not whether it be possible that the conclusion at which the evidence points may be false, but whether the evidence, all of the evidence, is sufficient to satisfy your minds and your consciences beyond a reasonable doubt.

A person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Now, under our law every person concerned in the commission of a crime is a party thereto, and may be charged with and convicted of the commission of the crime. A person is concerned in the commission of a crime only if he directly commits the crime, or intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime, either in fact or because of legal incapacity, or intentionally aids or abets in the commission of the crime, or intentionally advises, encourages, hires, counsels or procures another to commit the crime.

Any party to a crime who did not directly commit the crime may be indicted, tried, convicted and punished for commission of the crime upon proof that the crime was committed, and that he was a party thereto, although the person claimed to have directly committed the crime has not been prosecuted or convicted, or has been convicted of a

different crime or degree of crime, or has not amenable to justice or has been acquitted.

In this case two defendants are named; that is, Christopher A. Burger and Thomas D. Stevens. You, ladies and gentlemen of this jury, are to concern yourselves only with the trial of this defendant, Christopher A. Burger. The other defendant is to be tried by other jurors at a different time.

Now, I further charge you that although a person may have been present at or near the scene of a crime, that if he did not in any way intentionally aid, abet, procure, or intentionally participate in the commission of said crime he would not be a party to said crime.

Now, by definition, ladies and gentlemen, in our State a crime is a violation of a statute of this State in which there shall be a union of joint operation of act, or omission to act, and intention, or criminal negligence. I give you certain presumptions of law that are applicable to this case.

A presumption is a conclusion which the law draws from given facts. Each of these presumptions are rebuttable. That is, they are subject to being overcome by evidence to the contrary.

I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are

presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they accused is prosecuted.

A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

The law permits certain witnesses who have had special training, knowledge and experience in certain lines, such as the doctor from the State Crime Lab and the finger-print expert, to give their opinions as experts, based upon their knowledge of particular matters. I charge you that the weight which is to be given the opinions of expert witnesses is for you to decide. You may accept it and act on it, or you may reject it, and then act on your own judgment, as you apply it to the evidence in the case.

Now, the specific statute this defendant is charged with

having violated at the time and place named in the indictment is that of murder. The definition of our law of murder is: A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention, unlawfully, to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

A person also commits the crime of murder when in the commission of a felony, he causes the death of another human being, irrespective of malice.

I charge you that if you believe beyond a reasonable doubt that this defendant committed the crime as charged in this indictment, at any time prior to its return by the Wayne County Grand Jury, it would be your duty to convict him. In that event, the form of your verdict would be: "We, the jury, find the defendant guilty."

If you do not believe the defendant is guilty, or if you do not believe that he is a guilty beyond a reasonable doubt, it would be your duty to acquit him, or if there is a reasonable doubt in your mind as to his guilt, it would be your duty to acuit him. And, in that event, the form of your verdict would be: "We, the jury, find the defendant not guilty."

Before you go to your jury room, I do want you to understand that throughout this trial there have been many motions and objections, and statements by counsel for both sides, and by the Court. I emphasize to you that by no ruling which this Court has made during the progress of the trial before you has the Court intimated or expressed any opinion upon the facts of the case, upon the credibility of the witnesses, upon the weight of the evidence, or upon the guilt or innocence of this defendant. By no portion of this charge has the Court intimated or expressed any opinion upon these matters, each and all of which belong exclusively to you jurors for your judgment and your determination.

The Court states the law. You find the facts. You apply the one to the other, and in that way you decide the outcome of the case.

Under our law you are made the sole judges of the facts of the case. You are the sole judges of the credibility of the witness. You are the sole judges of the weight of the evidence. You are the sole judges of the guilt or innocence of the prisoner at the bar.

Now, when you go to your jury room, ladies and gentlemen, the first thing you need to do is elect your foreman. Then once the bailiff or sheriff, or deputy sheriff brings to you this indictment, and all of the exhibits which were introduced to you, after you received that and after you have elected you foreman, you may begin your deliberations as to the verdict in the case.

Once you have agreed upon a verdict, let the bailiff

stationed at your door know of that, and you will be brought back into the courtroom for publication of your verdict. Let your verdict be in one of the forms suggested to you by the Court to indicate your finding.

After all, since the beginning of the word itself, its very origin, the word "verdict" has always related to the word "truth". Therefore, let your verdict speak the truth. It must be unanimously agreed to by all of you, and it must be reduced to writing, and it should be written on the back side of the indictment at the very tip top of the page where it the printed words begin, "We, the jury, find the defendant blank", and there is a blank line there. Then it should be dated this date, signed by your foreman at the place indicated by the printed line, and the word under it, and then returned into open court.

I do repeat your verdict must be unanimous. The twelve of you in the jury box may retire to your jury room. And, the two of you who are alternate jurors may come out into the separate room where you were earlier.

You may retire.

83-6413

Jan. 23-24, 1978
- Original Trial on Sentencing -

Mr. District Attorney, do you have additional evidence or argument that you wish to put up?

MR. THOMAS: Can we approach the bench, Your Honor, just a minute?

THE COURT: Yes, sir.

(NOTE: Colloquy between Court and Counsel.)

THE COURT: Ladies and gentlemen, before going further as to the second feature of your duties, we will give you a short recess, and you may retire to your jury room. I will ask the alternates to step outside and remain separate and apart from the other twelve.

Mr. Foreman, you and the other ladies and gentlemen may go back to your jury room.

(NOTE: After a brief recess, the jury returned to the jury box, and the following transpired:)

THE COURT: For the record, gentlemen, do I understand that neither sides has any additional evidence to put up, either in aggravation or for leniency or mitigation?

MR. THOMAS: That's correct from the State, Your Honor.

MR. LEAPHART: Excuse me, Your Honor. Yes, sir.

THE COURT: All right. Proceed with your argument. Mr. Leaphart, you have the opening and concluding.

MR. LEAPHART: Your Honor, we waive the opening and reserve the right to conclude.

THE COURT: All right. Mr. Thomas.

MR. THOMAS: If it please the Court, and ladies and gentlemen of the jury, we expect Your Honor to give you in

We thank you.

THE COURT: Judge Leaphart.

MR. LEAPHART: Ladies and gentlemen of the jury, you have heard the evidence in this particular case, and you have found Christopher Burger guilty of the crime of murder. You have found that he killed Roger Honeycutt with an abandoned and malignant heart. That within itself is not enough under our laws to put him to death.

You've got to consider all the other ramifications involved in the case. One of the things is that there has been no evidence introduced here to show you that Christopher Burger has any history of any past crimes. If he had a history, a record of past offenses, you would have the benefit or could have the benefit of that, if the District Attorney saw fit to introduce it, and give you the benefit of past offenses.

So the fact that there has been no evidence that Christopher Burger has ever been convicted of any other crime is something for you to consider in whether or not to give him the death penalty. Most certainly there is no history that Christopher Burger ever committed any other offense of violence against anyone else in the past. So this is not some hardened criminal that you are dealing with that has been in and out of the penitentiary for numbers of times, for robbery and any other charge that he may have been convicted of. This is a man who has never, as far as the evidence in this case is concerned, never been in any trouble

Sentencing feature

in his life. That is something for you to consider. Now, you've got to go back and rehash to a certain extent all the evidence that you have heard in this case, and you get right down to the fact of certain witnesses who were at the call of the District Attorney who the evidence shows were present at the time that Burger made certain statements, who were not called to testify by the District Attorney, and he is asking you to make your decision to put this person to death when he did not give you all the evidence that was available concerning the admissions of Burger. When you get right down to it, when you get all the evidence, sift through all this evidence you come down to two things. You come down to a statement by Botsford who tied him into a situation, and then the testimony of Kaire, one of the investigating officer, as to the initial confession of Burger. You get right back to the fact that the FBI Agent Brewer was there, and heard and participated in the questioning of the defendant, and I feel out of fairness if you were going to be asked to put this defendant to death that he should have - you should have had the benefit of what he heard and what he understood that Burger said. He may have understood things a little bit different. I don't know. You don't know. Probably will never know, but there is a doubt in our minds that this could and did exist, and you could infer by the fact that they are not here that the District Attorney had some reason for not bringing these individuals here to testify before you.

He's alluded to drowning a horrible way to die. Well, of course, there is no nice way to die. There is no nice way to murder anybody. The drowning, if you know anything about drowning, drowning is simply strangulation. If you view it in that manner and in that effect, in that way, of course, most of us have a certain feeling about drowning, because water is alien to us. We don't have the same idea in our minds in looking at this situation like you are looking at it if he had been shot a couple of times.

He's just as dead whether he was shot or whether he was stabbed, or whether he was drowned. So drowning should not really be considered by you as a mitigating or an aggravating circumstance. It is just the method by which he was killed.

Now, you get back down to capital punishment and the reason for capital punishment. The District Attorney has alluded to the "eye for an eye, and a tooth for a tooth", "life for life". Well, that is the old Jewish law, and still is the Jewish law, and is still the law as the Moslems carry out in the desert communities in the Arabian deserts and places of that nature, where they live in tribes and move from place to place.

The reason for the Mosaic Law and the reason, one of the basic reasons for that harsh justice that was imposed by the earlier Jews in their march from Egypt to they finally got to the Promise Land was the fact that they would not stay long in one place, that they couldn't put up with prisoners.

They couldn't - they had no way to house prisoners. So when you did something wrong, when you stole something from somebody, when you got in a fight with somebody and put out somebody's eye, or when you killed somebody, well, they just said, 'Well, you've killed him, so that's it. Blam, because we don't have time to fool with you, because we've got to be on down the road about another thirty or forty miles tomorrow and we have no place for you.'

They heeded the swift tribal justice. And, that swift tribal justice, if you read in the papers, is still being carried in Saudi Arabia, and places like that, because these people still move about in the same manner that Moses and them moved about thousands of years ago.

After the Jewish people settled in what is now Israel or the Promise Land, they went from an urban - from a tribal society which moved about to a - from tribal to nomadic society, to an urban society, and they built houses, and communities, and they lived in one place. And, at that time, they began to build prisons, and places of punishment and confinement for people who committed crimes.

They no longer cut their hands off, or put out their eyes, or chopped their heads off if they did certain things. They began to an urban way of life. And, with the help of the Romans they progressed up until the time of Jesus Christ.

Now, Christ came along and brought in the idea that 'Just a minute, we don't need this old attitude of an eye for an eye, and a tooth for a tooth. You shoot me. I'm gone

shoot you. That's not the way we ought to do things. There is a better way. And, we should try to rehabilitate; we should confine; we should do this; but, let's do not take the lifes of other people, even though they make take our life or someone elses."

That is the Christian philosophy. That is the philosophy that is suppose to be followed by all of us who profess to be Christians. Now, if you are a Moslem or a member of the Jewish faith, then follow the Mossic Law, follow the Moslem Law, follow an eye for an eye, and a tooth for a tooth, a life for a life. But, if you are a Christian, you don't have that attitude.

A lot of us profess to be Christians. A lot of us claim to be Christians. But, when it comes down to practicing the Christian religion, the basic faith which most of us are suppose to follow, we, and I am no exception, sometimes only give it "lip service", and try to appear that way to other people.

You know, it is hard to be a Christian. Christ was crucified, he was killed because of his concepts. Various of his disciples, because they dared to take his philosophy, in that harsh day and time, and said "there is a better way, that we shouldn't do this any longer. This is not the way to do it. We should understand or try to. We should try to forgive. We should try to rehabilitate." Those people because they said this were unceremoniously killed by those who believed in an eye for an eye, and a tooth for a tooth.

Paul, follower of the Christian Church after Christ, under out laws today, for the things he did to the Christians would be put in the penitentiary. He was responsible for the death of many Christians, until the time of his rehabilitation and the time of his conversation into Christianity, at which time he changed the name of Saul to Paul, and took our on a road in an entirely direction than he took or had taken as a practicing Jew, an Abider, an Arabi, and an Abider of the Mosaic Law.

If Paul, if you look in the Bible at Paul. Paul changed. Paul got another chance. Christ didn't believe in this thing.

You people on the jury are going to fix the death penalty; not the Judge; the Board of Corrections; not whoever they've got down there that is going to actually go through the act of killing the individual that you designate to die. There are going to be twelve minds; not eleven, not eleven. Twelve minds in unison have to direct this Judge up here to sentence this man in whatever manner to whatever sentence is going to be imposed on him.

If you, your twelve minds direct him to sentence him, this boy here, to die, then it takes thirteen hands to execute him. There would be one man in person at the date of execution, and each one of you in spirit and mind.

You don't live in a vroeum. What you do today is not something that you can do and walk away from, and forget about it. Whatever decision you make, something that each

and every one of you are going to have to live with, sleep with, dream with and die with.

It is not something that will leave you the minute you walk away from this place. That is why, that is why each an every one of you have such an awful responsibility. You act as a group, but you can't - the group can't act without the individual. It takes twelve. It don't take eleven. It takes twelve to execute him.

The only thing that I say, and I ask you, is when you make up your mind, if you are Jewish, you believe in the Jewish faith, you believe in the Moslem faith, think like Moses would have thought. And, if you can content yourself with the thoughts of Moses and Moses' attitude, if that is what you really believe in, if all this other thing is only something you paid lip service to, go ahead and let everybody know it. But, if you are a Christian, ask yourself, what would Jesus Christ do in this situation?

And, when you ask yourself this, and if you honestly and in your heart put in the manner in which you think He would have acted, then you are not going to wake up some night and ask yourself did I do the right thing?

Thank you.

(NOTE: Thereupon the Court charged the following to the jury:)

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THE COURT: All right, sir. Are we ready to proceed, Gentlemen?

MR. LEPRARK: Yes, sir.

MR. THOMAS: Yes, sir, I think so.

THE COURT: Bring them in.

(Whereupon the jury returned to the courtroom.)

THE COURT: All right. Gentlemen, proceed with your Argument. The State has the opening. The Defendant has the closing Argument.

MR. TATUM: If it please the Court, Ladies and Gentlemen of the jury, I told you at the outset of this case that this was a retrial of the sentencing phase of this particular case.

I told you also that the Court would instruct you that the Defendant, Christopher A. Burger, was convicted for the offense of murder. And, you're concerned only with the sentencing phase, as we call it, and as you refer to it of this particular trial.

I also told you in the beginning and at the outset that the State of Georgia expected to show you by and under the evidence of this case aggravating circumstances that we contend existed during the commission of this offense.

I pointed out to you that we expected the evidence to show at least three aggravating circumstances to have existed during the commission of this murder. Those aggravating

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THE COURT: Judge Leaphart.

MR. LEAPHART: May it please the Court, just one second, Your Honor.

MR. THOMAS: If the Court please, Your Honor, prior to our going into any kind of exhibits, I'd like to have a bench conference with the Court, please.

(NOTE: Colloquy at bench.)

THE COURT: All right. Proceed.

MR. LEAPHART: Your Honor, would you give me just a second to get something to back that up, because I need, since I'm going to write on it I need to have something on it to back it.

THE COURT: Yes, sir. Do you know where there is something handy?

MR. LEAPHART: Ladies and Gentlemen of the jury, I'm sorry for, may it please the Court, I'm sorry for the interruption. I will use this blackboard in lieu of what I intended to use.

The District Attorney, of course, has pointed out what his contentions are as he is required to do in his advocacy of the State's position.

And, now it's my turn to point out to you certain things that I think will mitigate the circumstances or change the situation as outlined by the District Attorney, which does not require of you to give the death sentence. But, that justi-

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would best be served in this instance for a life sentence.

Now, the evidence shows that in this particular case there were two parties involved, Stevens and Burger. What were the ages of these parties? Stevens was twenty years old. Burger, seventeen years old.

The evidence in this case, who made the first aggressive move in the cab? The evidence shows that the sharpener came first by Stevens. Next the knife to aid Stevens. The first two aggressive acts.

Then, Burger then - Stevens then made him get out of the car. I just put out of car. Stevens robbed him from testimony, and you'll have his statement. This is a photocopy of his statement which they had produced in evidence, which shows that the robbery was actually perpetrated by Stevens. He got the money, he robbed the man. All right. Stevens robbed him.

MR. THOMAS: No object to that now, Your Honor. That's a misstatement. The evidence shows they split the money.

MR. LEAPHART: Stevens performed the act of robbery

THE COURT: The jurors will decide the facts, Gentlemen.

MR. LEAPHART: Stevens made him undress. Stevens performed the oral sodomy, the anal sodomy. Burger was not involved in that, did nothing to - he was in the front seat of the car driving the car. He did none of that. Stevens tied him up. Stevens told him to get in the trunk. And, Stevens stated that they ought to kill him. At that point

Burger, what did he say according to Botsford? Burger said "no, I don't want to kill him."

Now, I'm showing the attitude of the individuals at that time. And, who was actually perpetrating and who was actually the moving force in this particular set of circumstances. And, he said "no". What did Stevens do at that time? He told him to drive the car to the pond. Now, you'll have this in this statement right here, told to drive to the pond. And, he did what Stevens told him to. He got down there and the next thing that Stevens said, says "we must get rid of the car." The next thing he said, Stevens, according to the evidence in this particular case and according to this statement right here, said "we must get rid of the fingerprints." And, then he said, told him to drive it into the pond. And Burger, the seventeen year old, drove it into the pond.

There is Burger's overacts in the participation in the crime of murder for which he's been convicted. Each and every one of these acts, according to this statement which they have introduced into evidence, the initiation of the crime, the act of robbery, the acts of sodomy, the acts of tying him up, the telling him to get in the trunk, the saying let's kill him, telling him where to drive, telling him we must get rid of the car, we must get rid of the fingerprints, who was that? That was all Stevens. Stevens is not on trial here today.

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Now, this boy here was seventeen years old at that time, and Stevens was twenty. Now, we all know that the influence that a twenty year old person has over a seventeen year old person who he looks on as his friend and companion. And, all of this bears out that Stevens was the one in control. Now, that doesn't relieve Burger from being guilty of the crime of murder. Murder in this State or murder under the definition is the deliberate killing of another human being without any just cause. And, he has already been convicted of killing another human being without just cause. And, that under the laws of this State does not justify the death penalty.

The death penalty has to be shown aggravating circumstances existed. And, the Judge is going to charge you this. If you see fit, and this is a matter entirely to your discretion, you may provide for a life sentence for the accused based upon any mitigating circumstance, or a reason satisfactory to you, or without any reason. You may recommend life imprisonment even though you have found aggravating circumstances, or one or more of the aggravating circumstances given to you in this charge to have existed beyond a reasonable doubt.

Well, why is that the law? That's the law because of the situations such as this where you have a moving force, and you have a person who follows along and does the beating of an individual, who gets convicted of murder. And, the

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person who actually perpetrated the crime was, and actually was the catalyst, the moving force that carried it all about and did all these things even though this person was a part of it, that the punishment of one is different from the punishment of the other, or can be. That was in your discretion.

And, in this particular situation, even though you say under these set of circumstances these things existed, Burger did none of that, except being involved there at that time and going along with Stevens who was the leader.

Now, I know that the idea of rape and sodomy is shocking to anybody, even more so to people who have, whose work in life is totally foreign to this type of thing. But, this is something that exists. It happens. And, the reason that a woman's attitude towards these things, if you stop and think, is the vulnerability of woman to sex abuse throughout history. And, women have a natural fear of this type of thing. And, you should not let that prejudice your mind, or you men who the idea of being forced to commit such as this would be totally degrading as far as you're concerned. The mere fact that this happened should not steal your minds to such an extent that you lose the ability to sift between who was the one who really did this, and who was the one who happened to be there when it occurred.

There's no evidence in this case that Burger did anything

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involving those particular acts. It's to the contrary. There's nothing here. Now, I would dare say if it wasn't for these two acts that were done by Stevens, that your attitudes toward this particular case would be entirely different than what it is, if you think about it just for a minute.

Now, you've listened to the District Attorney talk about this in a very passionate speech. But, you don't put a person to death just on, based on a passionate speech or whatever, and your own prejudices in hearing things. You've got to be logical. You started out and promised this Court and you stated under oath that you were completely neutral at the very beginning, and you should've been. And, you should view this evidence in view of what one did as to what the other one did.

Now, he's already been found guilty, as I said, of the crime of murder. And, it's up to you to determine the punishment. He's already been found guilty of the deliberate killing of one human being in the peace and dignity of the State of Georgia without just cause. And, that and in and of itself does not allow you to give him the death penalty. And, the facts and circumstances in this case are not such that Chris Burger under the evidence is entitled to such.

Now, we all hear about an eye for an eye and a tooth for a tooth and all this. Now, one of the things that I asked you or the Court asked you was your religious affiliation. Each

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and everyone of you are affiliated with some church according to what you say and according to what you intimated, each and everyone of you follows the teachings of Jesus Christ and believes in the Old Testament as well as the New Testament whichever, according to your denominational, whatever denomination that you belong to.

If you remember the Bible, the first murder that took place in the Bible was when Cain killed his brother Abel. Now, if you recall that Cain was, he was a farmer, and Abel was a shepherd. And, Abel made certain sacrifices and Cain did. And, because God was more pleased with Abel's sacrifices than Cain's, Cain got mad and jealous and killed him. But, what did God do? Did he - and Abel was at that time, according to the Bible, was just as close as anybody on earth to Him. What did he do? Did he reach out in a righteous indignation and knock him down, and kill him at that time? He didn't, if you recall. He says - you all heard of the mark of Cain. He says "I'm gone put a mark on you so everybody will know what you did. And, everywhere you go they will know that you killed your brother Abel." And, then Cain said "well, look, if they find out who I am, they're gone kill me." He said "no, they're not." He said "I'm gonna protect you. And, you will live with men and be despised."

Now, God Almighty in the Old Testament, the vengeful

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God we all read about, we were all taught about, before Jesus Christ ever got here, did not take the life of the man who murdered his most faithful servant and worshiper.

Our laws, our legend, our Constitution and everything else that we believe in, and we're supposed to build our lives and government on is found in the Old and New Testament and the various philosophies of Europe, England,and the philosophies that we develop in this country. But, the very foundation, that's the very foundation of the laws of this countr and this state.

We get along to the point that Moses came along, and they invented or brought about an eye for an eye and a tooth for a tooth. Now, if you will recall, at that particular period of time there were no nomadic societies, traveling back and forth through the desert. They didn't have time to fool with criminals. They didn't have time to rehabilitate anybody. They didn't have anything to confine anybody in, so they had to deal with people and punish them right then and there because they were moving on the next day, and they couldn't be bothered with hauling somebody around in chains.

They finally settled down and developed an urban society, and along come the Roman Empire and Jesus Christ. And, Jesus Christ said 'look, there's got to be a better way. Said 'man can be rehabilitated, man can change. Man should not be treated with the indifference that he was treated in

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the Old Testament." And, so along come the philosophy of Jesus Christ.

Now, we are supposed to be christians. And, one of the problems of our young people today is they see their mothers and fathers going to church every Sunday and sitting on the first and second and third row, and acting like christians, paying lip service to Jesus Christ. And, come Monday morning or ever Sunday afternoon in some events they forget all about it. They forget about this love thy neighbor stuff, and then they start gouging their fellow man from Nine to Five, five days a week, and fooling around on Saturday, and then going to church on Sunday. That's one of the things wrong with our society is we claim to believe so much, and we claim to stand for so much. We claim to believe in Jesus Christ on one hand, and then we'd want to practice the, what amounts to the Islamic Law on the other one.

We read in the newspaper what they're doing with their people in Iran. They're killing that, they're executing them right and left under the Islamic Law.

What you've been called upon to do is a very serious thing. And, it's a thing, a decision that you have to make. And, you as jurors can consider every aspect. You are the judges of both the fact and the law. And, in this particular instance you can use all your experience in life, your religious affiliation, your beliefs, what you think is right

in terms of what you feel.

I want to ask you to do one thing before you go out. When you consider all of this, when you consider what was done, and then you break it down, and you consider who did what, who was the actual moving force, ask yourself one thing. Ask yourself this question. What would Jesus Christ do if he were sitting in our shoes today?

(WHEREUPON, the Court's charge follows:)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

Supreme Court, U.S.
FILED
MAR 30 1984
ALEXANDER L. STEVAS
CLERK

No. 83-6413

CHRISTOPHER A. BURGER,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General
Counsel of Record
for the Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

SUSAN V. BOLEYN
Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

defendants. Further, though an obvious fact, Respondent notes that Petitioner has conspiciously failed to note in his brief that he and his companion in the murder received separate trials before separate juries and were in fact represented by separate attorneys.

With reference to the proper legal standard to be utilized in evaluating an allegation of conflict of interest, the courts below correctly noted:

> A conflict of interest must be actual rather than speculative before the constitutional guarantees of effective assistance of counsel are implicated.

Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979).

Further, in United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978), citing Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) and United States v. Fannon, 491 F.2d 129 (5th Cir. 1974), cert. denied, 419 U.S. 1012 (1974) the court appropriately opined that:

> Although an accused is entitled to counsel free of conflict and obligations, not every conflict in representation will be so egregious as to constitute a violation of the Sixth Amendment. For example, joint representaion of co-defendants is not a per se violation of the Sixth Amendment.

United States v. Alvarez, supra at 1255.

In an attempt to meet his burden of demonstrating an actual conflict of interest under which Mr. Leaphart allegeldy labored, Petitioner presented the testimony of Mr. Leaphart at the federal habeas corpus evidentiary hearing. The Petitioner's obvious intention in calling Mr. Leaphart as a

1.

Whether this Court should grant a writ of certiorari to review Petitioner's contention that he was rendered the ineffective assistance of counsel, which contention has been found to be totally without merit by every state and federal habeas corpus court?

2.

Whether this Court should grant a writ of certiorari to review Petitioner's contention that in Godfrey v. Georgia, 446 U.S. 520 (1980) this Court ruled O.C.G.A. § 17-10-30(b)(7), former Ga. Code Ann. § 27-2534.1(b)(7), to be unconstitutional on its face?

3.

Whether this Court should grant a writ of certiorari to review Petitioner's contention that the trial court's charge impermissibly shifted the burden of proof on the element of intent, which contention has been found to be totally without merit by every state and federal reviewing court?

Page(s)

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING THE WRIT:

I. PETITIONER'S CONTENTION THAT HE WAS RENDERED THE INEFFECTIVE ASSISTANCE OF COUNSEL HAS BEEN PROPERLY FOUND TO BE TOTALLY WITHOUT MERIT BY EVERY STATE AND FEDERAL HABEAS CORPUS COURT 10

II. PETITIONER'S CONTENTION THAT IN GODFREY V. GEORGIA, 446 U.S. 520 (1980) THIS COURT RULED O.C.G.A. § 17-10-30(b)(7), FORMER GA. CODE ANN. § 27-2534.1(b)(7) TO BE UNCONSTITUTIONAL ON ITS FACE, IS DERIVED FROM A MISREADING OF GODFREY V. GEORGIA, SUPRA AND IS WITHOUT MERIT. 20

III. PETITIONER'S CONTENTION THAT THE TRIAL COURT'S CHARGE IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF ON THE ISSUE OF CRIMINAL INTENT HAS BEEN PROPERLY FOUND TO BE TOTALLY WITHOUT MERIT BY EVERY STATE AND FEDERAL REVIEWING COURT. 22

CONCLUSION 32

CERTIFICATE OF SERVICE 33

Cases Cited: Page(s)

Blake v. Zant, 513 F.Supp. 772 (S.D. Ga. 1981). . . . passim

Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978). . 1, 4, 14

Burger v. State, 245 Ga. 458, 265 S.E.2d 796 cert. denied, 448 U.S. 913 (1980) 4

Burger v. Zant, 718 F.2d 979 (11th Cir. 1983) 3

Connecticuit v. Johnson, ___ U.S. ___, 103 S.Ct. 969 (1983) 31

Cupp v. Naughten, 414 U.S. 141 (1973) 29

Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) 11

Gideon v. Wainwright, 372 U.S. 335 (1963) 15

Godfrey v. Georgia, 446 U.S. 520 (1980) 20, 21

Godfrey v. Georgia, 446 U.S. 520 (1980) 20, 21

Hammondtree v. Phelps, 605 F.2d 1371 (5th Cir. 1979). 28

Koehler v. Engle, 707 F.2d 241 (6th Cir. 1983), cert. granted ___ U.S. ___, 104 S.Ct. 231 (1983). . . 22, 23

Mays v. Balkcom, 631 F.2d 48 (5th Cir. 1980). 15

Powell v. Alabama, 287 U.S. 45 (1932) 15

Proffit v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) 15

Sandstrom v. Montana, 442 U.S. 510 (1979) 23, 26, 27, 29

Skrine v. State, 244 Ga. 520, ___ S.E.2d ___ (1979) . 29

Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). . . . 15

Stephens v. Zant, 631 F.2d 397, modified on panel rehearing, 648 F.2d 446 (5th Cir. 1981) 2

United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978) 11

United States v. Chiantese, 560 F.2d 1244 (5th Cir. 1977) 26

United States v. Fannon, 491 F.2d 129 (5th Cir. 1974) cert. denied, 419 U.S. 1012 (1974). 11

Ulster County Court v. Allen, 442 U.S. 140 (1979) . . 26, 27, 28, 29

United States v. Killian, 639 F.2d 206 (5th Cir.) cert. denied, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981) 15

Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982)(en banc), cert. granted, ___U.S.___, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). 15

Zuck v. Alabama, 588 F.2d 436 (5th Cir. 1979) 11

Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed. 235 (1983) 20, 21

STATUTES CITED:

O.C.G.A. § 17-10-30(b)(7); Ga. Code Ann. 27-2534.1(b)(7) 20, 21

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-6413

CHRISTOPHER A. BURGER,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

The Petitioner was convicted of murder in the Superior Court of Wayne County, Georgia on January 25, 1978. A sentence of death was imposed. On direct appeal to the Supreme Court of Georgia the Petitioner's conviction was affirmed; however, the Petitioner's sentence of death was vacated and a new trial was ordered as to punishment at Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978).

The Petitioner was subsequently retried on the issue of punishment and on July 19, 1979 the Petitioner was again sentenced to death. On direct appeal from the reimposition of the death penalty the Supreme Court of Georgia affirmed the Petitioner's sentence at Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980).

State habeas corpus relief was denied on October 1, 1980 by the state habeas corpus court, which denial of relief was

affirmed by the Supreme Court of Georgia on that same date. From the denial of habeas corpus relief in the state courts, on October 2, 1980 the Petitioner filed an application for habeas corpus relief in the United States District Court for the Southern District of Georgia, Brunswick Division.

After conducting an extensive evidentiary hearing on March 4, 1981 the district court, on April 29, 1981 rendered its Order and Judgment granting the Petitioner habeas corpus relief in the form of an Order vacating Petitioner's sentence of death. The district court afforded habeas corpus relief in this regard based solely upon the circuit court's decision in Stephens v. Zant, 631 F.2d 397, modified on panel rehearing, 648 F.2d 446 (5th Cir. 1981).[1] The district court denied Petitioner's request for habeas corpus relief on all other allegations contained in his petition.

On May 11, 1981 the Respondent filed his notice of appeal from the district's granting of habeas corpus relief in the form of an Order vacating Petitioner's sentence of death. Petitioner filed a timely cross-appeal from that portion of the district court's Order denying habeas corpus relief on all other allegations contained in the petition.

On October 13, 1983, after extensive briefing and oral argument, the United States Court of Appeals for the Eleventh

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[1]On Argument before the United States Court of Appeals for the Eleventh Circuit, counsel for the parties agreed that this Court's then pending decision in Zant v. Stephens, __ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) would control dispostion of the sole basis upon which habeas corpus relief was afforded by the district court. As is revealed by an examination of the circuit court's opinion below at Burger v. Zant, 718 F.2d 979, 982 (11th Cir. 1983), in light of this Court's opinion in Zant v. Stephens, supra, the district court's grant of habeas corpus relief was reversed.

Circuit rendered its opinion reversing the district court's granting of habeas corpus relief. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983).

On February 13, 1984, Petitioner's petition for rehearing and suggestion for rehearing en banc was denied. On February 27, 1984 the circuit court denied Petitioner's request to stay the mandate pending filing of an application for a writ of certiorari in this Court. On March 6, 1984, upon receipt of the mandate of the circuit court, the district court entered its Order making the judgment of the United States Court of Appeals for the Eleventh Circuit the judgment of the district court. From the denial of habeas corpus relief Petitioner has pursued the instant application for a writ of certiorari.

STATEMENT OF FACTS

As noted by the Supreme Court of Georgia on the appeal taken by the Petitioner following his retrial on sentencing and the reimposition of a sentence of death, "[t]he facts surrounding the death of the victim, Roger Honeycutt, are amply set out in Burger v. State, supra and its companion case, Stephens v. State, 242 Ga. 34 (247 S.E.2d 838)(1978) and will not be repeated here." Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980). Because the facts underlying Petitioner's reimposed sentence of death are the same as those adduced on his trial of January 23 and 24, 1978 which resulted in his conviction and original sentence of death, the transcript references in the following statement of facts are to the transcript of the original trial of January 23 through 24, 1978.

James Botsford, an army tank driver stationed at Fort Stewart, Georgia, had known Petitioner and co-indictee Thomas D. Stevens in Army Basic Training. (T. 85-88). Arriving at the Savannah Airport on September 4, 1977, Bosford telephoned the army base to ask about getting a ride from the airport to Fort Stewart. (T. 88-89). He spoke to Petitioner who told him that he and Stevens would pick him up at the airport. (T. 89). About two hours later Petitioner and Stevens arrived at the airport driving a taxicab. (T. 90). After Bostford got in, with Petitioner driving, he was told by Petitioner and Stevens that the cab was stolen. (T. 91, 95).

Stevens informed Botsford that he and Petitioner had forced the cab driver with a knife and knife sharpener to give them money, perform "unnatural acts" and then get into the car trunk. (T. 96). Although Stevens did most of the talking, Petitioner was agreeing with what was said. (T. 93). Stevens then called back to the trunk: "'Are you still there?'" Botsford heard a voice reply, "Yes sir." (T. 97). Stevens showed Botsford a knife and knife sharpener, which he put under the front seat. (T. 97).

During the ride back to Fort Stewart, Stevens called back to the trunk several times asking the cab driver if he was there. (T. 103). Botsford always heard a voice answer. (T. 103). Stevens said that he had sexually assaulted the driver and that they should kill him and burn the car. (T. 100, 101). Botsford asked Petitioner and Stevens to free the driver and he told them that he would not tell the law if they would not kill the cab driver. (T. 100-104). Petitioner and Stevens both agreed to let the driver go. (T. 100, 104).

The following evening, Botsford was visited at Fort Stewart by fellow soldiers Petitioner and Stevens who asked him if he had said anything. (T. 106). When Botsford told them he had not, they said they had freed the cab driver and ditched the car near Hinesville, Georgia. (T. 107). Prompted by a radio bulletin that he later heard regarding a missing cab driver, Botsford went to the State Patrol and the Army Criminal Investigation Department with the information he possessed. (T. 108-109).

An army investigation, John Berzenski, was notified on September 6, 1977 of a missing cab and driver. (T. 134). Berzenski and Clarence Haire, also an army investigator, found a boot on Highway 144 with the name of Roger Honeycutt inside. (T. 135, 136, 141). They found another boot, army socks, and a piece of yellow plastic approximately 200 yards within each other on Highway 144. (T. 137-138, 144-147).

Honeycutt, the missing cab driver, was an army private also stationed at Fort Stewart, Georgia. (T. 121). He drove for the D&M Cab Company on nights and weekends. (T. 120-121).

Haire questioned members of Honeycutt's unit on September 9th in an attempt to locate Honeycutt. (T. 149). One of the men he questioned was Petitioner who told him that he had a friend who called the Shuman Cab Company about 10:00 p.m. on September 4th, but that they did not take the cab when it arrived at Fort Stewart. (T. 149-150). A Shuman cab driver

testified that he did in fact get a call from Fort Stewart on September 4th, and in response thereto, he drove there accompanied by a friend. (T. 129-130). Two men asked him if he had change for $50.00, then left and did not return. (T. 130, 131). They had told him they were going to the airport. (T. 130). As the Shuman cab driver was leaving, the driver saw a D&M cab drive away from a nearby building at about 10:15 or 10:20 p.m. (T. 131).

A Jackson-Denno hearing was held outside the presence of the jury at trial to determine the voluntariness of the statement made to Investigatior Haire and Wayne County Detective F.J. Shuman. (T. 169-168). The trial court heard testimony from Haire, Detective Shuman and defense witness Dr. Joseph O'Haire, a clinical psychologist. Dr. O'Haire testified that Petitioner had a "mental deficiency" and a "psychopathic personality" that made him want to do wrong. (T. 248, 250). After hearing the testimony, the court ruled that the statements were voluntarily made. (T. 268).

The jury was returned to the courtroom and Investigator Haire testified that he interviewed the Petitioner on September 12th and advised Petitioner of the Miranda warnings. (T. 269-270). Petitioner stated that he did not want a lawyer and would answer any questions posed, after which Petitioner executed a waiver of rights form. (T. 272-273). At first, Petitioner denied any knowledge of Roger Honeycutt or Honeycutt's disappearance. (T. 276). When informed that there existed information that he had been in possession of the missing taxicab, Petitioner made a statement. (T. 278). Investigator Haire related the contents of Petitioner's statement to the court and to the jury. Petitioner stated that when he and Stevens ran out of money while drinking beer at the enlisted men's club, Stevens suggested robbing a taxicab driver. (T. 278-279). The two men summoned a Shuman Company cab, but decided not to take it when it arrived with two men

inside. (T. 279). Petitioner and Stevens then received a telephone call from Botsford, who was at the Savannah Airport, requesting a ride to Fort Stewart. Petitioner agreed to pick Botsford up at the airport. (T. 279).

Stevens and Petitioner next burglarized the dining facility where Stevens got a knife sharpener and Petitioner got a butcher knife. (T. 278). Thus armed, the two men telephoned and requested a D&M cab. (T. 280). When the cab arrived, Petitioner and Stevens asked the driver if he could change a $50.00 bill, and the driver said he could. (T. 280). Approximately fifteen miles away from the army base on Highway 144, as planned by a prearranged signal, Stevens placed the knife sharpener around the driver's neck while Petitioner put the butcher knife to the driver's ribs. (T. 280).

The driver was instructed to pull over and get out, and to give Petitioner and Stevens all of his money. When the driver gave Petitioner and Stevens only $16.00, the two asked the driver if he had more money, and when he stated that he did not, they forced the driver into the back seat of the taxi. (T. 281). Stevens then had the driver remove his boots and clothes which Stevens searched for money. (T. 281). With Petitioner driving, Stevens threw each item of the driver's clothing out of the window after it had been searched for more money. (T. 281). In addition to searching the driver and his clothing, Stevens and Petitioner also searched the automobile for money. (T. 281).

After robbing the driver and forcing him to disrobe, Stevens forced the victim to perform oral sodomy on him. (T. 282). Stevens then performed anal sodomy on the victim. (T. 282). Before they reached the airport, Petitioner and his cohort forced the bound driver into the trunk of the taxicab. (T. 282). Petitioner and Stevens then proceeded on to the Savannah Airport where they picked up their friend Botsford and bragged to him that they had stolen the taxicab and had the

bound driver secured in the trunk. (T. 283). Petitioner and Stevens, in order to convince Botsford of the truth of their story, called back to the driver, requiring that the driver respond. (T. 283). Stevens suggested that they kill the driver, but Botsford protested and asked them not to do so. (T. 284).

After dropping Botsford off at Fort Stewart, Georgia, Petitioner and Stevens drove on to Jesup, Georgia, where they careened up and down several dirt roads to make the car go "from side to side," forcing the victim to roll around in the truck. (T. 284). The two men then stopped at a convenience store where Stevens removed the taxicab's dome light and hid it in the bushes. (T. 284).

After noticing a patrol car following them for a short period of time, Petitioner and Stevens decided to get rid of the taxicab. (T. 285). The two men drove to a "borrow pit" where they had gone swimming several times in the past. Petitioner and Stevens were careful to wipe their fingerprints from every area of the taxicab. (T. 286). Afterwards, Petitioner raised the lid of the trunk and asked the victim if he was alright. The victim responded that he was, and Petitioner closed the lid of the trunk. (T. 346). Petitioner then started the automobile and drove it into the "borrow pit," jumping from it just before impact with the water. (T. 286, 289). Petitioner and Stevens waited at the scene of the murder, watching the taxicab as it slowly sunk beneath the surface of the water. (T. 286). Petitioner further stated to Investigator Haire that they had tied the victim's hands with cord cut from the taxicab's C.B. radio, and that they had thrown the radio into the bushes beside the "borrow pit." (T. 286). To Investigator Haire, Petitioner admitted that he and Stevens killed the taxicab driver to prevent him from identifying them later. (T. 287).

After completing his statement to Investigator Haire, Petitioner offered to show Haire where the borrow pit was located. (T. 89). Haire and two other men from the criminal investigation office, pursuant to Petitioner's directions, proceeded to the borrow pit. (T. 289). Shortly afterwards, Detective Mike Deal arrived at the borrow pit where the missing taxicab was ultimately recovered. (T. 152, 161). A knife and a knife sharpener were found on the right floorboard of the cab. (T. 157, 158). A body in the trunk of the car was subsequently identified as that of Roger Honeycutt. (T. 306, 308, 311). The victim's death was established as being caused by drowning. (T. 308).

Wayne County Detective F.J. Shuman testified at trial that he took Petitioner from Fort Stewart authorities to the Wayne County Jail on September 13, and advised Petitioner of the Miranda warning. (T. 319-320). Shuman and Petitioner went over Petitioner's statement to Haire word by word, and Petitioner affirmed to Shuman everything contained in the statement. (T. 322). Petitioner also added that he and a friend returned to the borrow pit to get the C.B. radio, and that the radio was in Petitioner's mother-in-law's automobile. (T. 323).

On September 14, Petitioner directed Wayne County authorities over the same route that he and Stevens had driven the stolen taxicab. (T. 325). The cab's dome sign was recovered from the bushes near a convenience store, and the yellow plastic found on Highway 144 was determined to have come from the taxicab's dome sign. (T. 326, 328, 329).

Further facts will be developed on this response as needed to further illuminate any issue raised herein.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. PETITIONER'S CONTENTION THAT HE WAS RENDERED THE INEFFECTIVE ASSISTANCE OF COUNSEL HAS PROPERLY BEEN FOUND TO BE WITHOUT MERIT BY EVERY STATE AND FEDERAL HABEAS CORPUS COURT, THUS, THIS CONTENTION CANNOT SERVE AS A BASIS FOR GRANTING THE REQUESTED WRIT. (Contention No. 1).

On this first contention, Petitioner alleges that he was rendered the ineffective assistance of counsel in violation of the Sixth, Eighth and Fourteenth Amendments in that (1) his trial counsel allegedy labored under a conflict of interest, and (2) because trial counsel was allegedly per se ineffective for not presenting evidence on the sentencing phase of trial.

1.

Addressing first Petitioner's allegation of a conflict of interest, the Respondent notes that Petitioner contends that the state habeas corpus courts, the federal district courts and the Eleventh Circuit Court of Appeals wrongly concluded that Mr. Leaphart, Petitioner's trial and appellate counsel, did not labor under any conflict of interest. Specifically, the Petitioner argues that because Mr. Leaphart was a member of the same law firm as the attorney who represented Petitioner's co-indictee at a separate trial, a conflict of interest existed of such a magnitude as to render Mr. Leaphart's assistance ineffective. In support of his position the Petitioner cites this Court to many cases, however, the cases relied upon by the Petitioner are inapplicable as they relate to the representation at trial by one attorney of multiple

witness was to prove that Mr. Leaphart labored under a conflict of interest due to alleged inconsistent defenses possessed by Petitioner and Stevens, and due to the "disparity in involvement in the two individuals and the disparity in age . . . ." (H.T. at 6).[2] Petitioner's contention made to the district court, repeated on appeal to the Eleventh Circuit Court of Appeals, and presented now to this Court, is that Mr. Leaphart tailored his trial strategy, allegedly to the Petitioner's detriment, in order to protect Thomas D. Stevens. Contrary to Petitioner's contention, however, at the federal habeas corpus evidentiary hearing Mr. Leaphart testified that there existed no conflict of interest and that because Petitioner and Stevens received separate trials before separate juries, there existed no possibility of inconsistent defenses. (H.T. at 15, 62). Mr. Leaphart testified that he used a graph at trial upon which he listed each and every act performed by Stevens as compared to those acts performed by Petitioner so as to dramatically point out to the jury the disparity in the actions of the participants in the murder, the armed robbery, the kidnapping and the acts of sodomy, in an effort to demonstrate the greater culpability of Stevens. (H.T. at 20-23, 62-63). (Petitioner's Exhibit No. 1). On the aforementioned graph Mr. Leaphart depicted Stevens as the chief architect of the crime, with Petitioner as an alleged "follower type." (H.T. at 23). As noted by the district court, Mr. Leaphart's habeas corpus testimony was directly supported by an examination of the trial transcript at pages 257 through 262. Further, Mr. Leaphart testified that if crucifying Stevens would have helped Petitioner at trial, he would have crucified Stevens in an instant. (H.T. at 53).

In his brief to the circuit court, and here on this application for certiorari, Petitioner contends that the

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[2]H.T.: refers to the transcript of the March 4, 1981 federal habeas corpus evidentiary hearing.

alleged conflict of interest was further manifested by Mr. Leaphart's failure to offer Petitioner's testimony against Stevens in exchange for a sentence less than death. The Petitioner fails to note for this Court's benefit, however, that at the federal habeas corpus evidentiary hearing Mr. Leaphart specifically testified that notwithstanding his attempt at plea negotiations the district attorney, confronted by a brutal and heinous murder and armed with sound confessions from the Petitioner, flatly refused to even discuss plea negotiations. (H.T. at 65).

> Q. Did you ever engage in any plea neogitations in this case?
>
> A. Yes.
>
> Q. Could you tell me the substance of it?
>
> A. Well, we -- I constantly all during the time I represented Mr. Burger tried to negotiate a plea with the district attorney for a life sentence and, he -- during the first trial he just flatly refused to even discuss it in any terms. And, then when we got it reversed on the sentence feature I continued to -- in that time to try to negotiate with the -- with the district attorney about entering a plea, for Mr. Burger to serve a life sentence and, he insisted on trying it and insisted on seeking the death penalty.

(H.T. at 65). As the foregoing readily reveals, contrary to Petitioner's misrepresentations, the district attorney, in a proper exercise of his discretion, completely foreclosed any possibility of plea negotiations.

Also lacking in substance is Petitioner's contention that as a result of some, still as yet unidentified conflict of

interest, Mr. Leaphart failed to properly brief and argue Petitioner's case on direct appeal. Again, Petitioner curiously and conspiciously fails to note that it was Mr. Leaphart's actions as appellate counsel which resulted in the Supreme Court of Georgia's first opinion vacating Petitioner's originally imposed sentence of death. See Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978).

Having completely failed to present at the federal habeas corpus hearing any evidence of the existence of an acutal conflict of interest, the Petitioner on appeal to the circuit court, as on this application to this Court, invites this Court to engage in unwarranted speculation and assume the existence of some conflict based upon Mr. Leaphart's failure to argue Petitioner's alleged less culpability on direct appeal to the Supreme Court of Georgia. Again, Respondent notes that Petitioner has curiously failed to inform this Court that while Petitioner did not engage in the actual acts of oral and anal sodomy committed on the victim, the Petitioner did participate in the planning and the actual armed robbery and the kidnapping of the victim. Although Mr. Leaphart commendably attempted to portray Petitioner as the less culpable party before the jury, the fact remains that it was Petitioner who sadistically raised the lid of the trunk of the taxicab, inquired of the victim's well being, then closed and locked the trunk before driving the taxicab into the borrow pit. The evidence is undisputed that it was Petitioner who was the actual murderer. To argue that Mr. Leaphart's failure to contend on appeal that Petitioner, the actual murderer, was the culpable party, constitutes evidence of the existence of an actual conflict of interest, borderes on the absurd.

As correctly noted by every reviewing court below, and concluded by the district court, "[t]he facts thus present no inference of any conflict of interest actual or potential." Blake v. Zant, 513 F.Supp. 722, 796 (S.D. Ga. 1981).

Secondly, with reference to Mr. Leaphart's alleged ineffectiveness, Petitioner contends that Mr. Leaphart failed to investigate or prepare for the penalty phase of trial. The legal background against which Petitioner's allegation is to be examined is well settled. A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment and due process clause of the Fourteenth Amendment. See Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). Effective assistance of counsel, such as will satisfy the requirement of the Sixth Amendment, is counsel "reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982)(en banc), cert. granted, ___U.S.___, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). See United States v. Killian, 639 F.2d 206, 210 (5th Cir.), cert. denied,451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394, (1981); Mays v. Balkcom, 631 F.2d 48, 52, n.1 (5th Cir. 1980). Respondent further notes that in a capital case the standards for judging effective assistance of counsel remain the same as in any other case, and that the seriousness of the charges against the defendant is simply a factor that must be considered in accessing counsel's performance. Stanley v. Zant, 697 F.2d 955, 962-963 (11th Cir. 1983). See Proffit v. Wainwright, 685 F.2d 1227, 1247 (11th Cir. 1982). Under the circuit court's holding in Washington v. Strickland, 693 F.2d at 1262, in the Eleventh Circuit Court of Appeals a defendant convicted in a state court bringing a habeas corpus petition in federal court ordinarily must show that his counsel's ineffectiveness, if proven, resulted in actual and substantial disadvantage to the course of his defense at trial. As is readily apparent, assuming a petitioner's ability to demonstrate the ineffectiveness of his counsel, petitioner still bears the burden of meeting the prejudice requirement of Washington v. Strickland, supra.

With the foregoing in mind, Respondent now turns to the facts of the instant case. Contrary to the Petitioner's contentions, Mr. Leaphart testified at the federal habeas corpus evidentiary hearing that in addition to his investigation of the actual facts surrounding the commission of the crimes and the Petitioner's involvement therein, he also investigated Petitioner's background. (H.T. at 35, 37). In pursing this phase of his investigation Mr. Leaphart acquired several reports from, and conversed with psychologists in Indianapolis who had examined the Petitioner on prior occasions. (H.T. at 35, 50). Mr. Leaphart spoke by telephone and conducted several personal interviews with the Petitioner's mother. (H.T. at 36). Blake v. Zant, 513 F.Supp. at 796 n.6.

Mr. Leaphart testified that he explained to the Petitioner and to the Petitioner's mother the purpose of the retrial on sentencing and the fact that he could "generally put up anything you can find that is good about anybody in mitigation of the sentence." (H.T. at 36). Mr. Leaphart further testified that his background investigation revealed that prior to entering the Army the Petitioner had been the victim of a broken home, had been in trouble with the police in Florida after which the Petitioner had gone back north to live where he got in trouble with police again. (H.T. at 38). Mr. Leaphart further testified that he questioned Petitioner's mother regarding the existence of potential witnesses that might be used on the sentencing phase of trial. (H.T. at 44). Mr. Leaphart also located and discussed the Petitioner's case with an attorney the Petitioner had allegedly lived with. (H.T. at 44). Mr. Leaphart also testified that his conferences with the Petitioner's mother produced very little helpful evidence that could have been used on the sentencing phase of trial. (H.T. at 64). Throughout his investigation Mr. Leaphart was unable to locate the Petitioner's father, nor did any other member of the Petitioner's family contact Mr. Leaphart or come forward, nor offer their testimony. (H.T. at 64).

Prior to trial Mr. Leaphart explained to the Petitioner the nature of the proceedings, how to dress and the proper demeanor for Petitioner to display at trial. (H.T. at 65-66). The Petitioner was advised of his rights and was specifically advised of his right to take the witness stand and testify in his own behalf. Mr. Leaphart testified that he discussed with the Petitioner the issue of whether the Petitioner should take the stand on the sentencing phase. (H.T. at 66). In this regard Mr. Leaphart testified that notwithstanding the harm that would have resulted from subjecting the Petitioner to cross-examination by the district attorney, Mr. Leaphart was even more concerned with the harmful effects upon the jury of the Petitioner's gloating, indifferent and sadictic attitude.[3] (H.T. at 66). Mr. Leaphart also testified that he did not place the Petitioner on the witness stand because the Petitioner was unpredictable and he did not know what he would say. (H.T. at 69). Mr. Leaphart further testified that in light of the unfavorable testimony that might be brought out on cross-examination of the Petitioner's mother, i.e., Petitioner's prior encounters as a defendant with the criminal justice system, the potential harm to the Petitioner far outweighed the limited positive testimony that could have been elicited. (H.T. at 68). Obviously, such a strategic decision is of the type generally afforded all trial counsel.

Here on this application for a writ of certiorari new counsel for Petitioner essentially contends that had he been counsel at trial he would have handled matters differently. Notwithstanding counsel's assertions, Mr. Leaphart is not rendered ineffective merely because counsel here in habeas corpus, with the benefit of the infinite wisdom of hindsight, differs with the strategy used at trial. Contrary to the

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[3]In this regard the Respondent notes that at the federal habeas corpus evidentiary hearing even counsel for the Petitioner on this application did not call Petitioner as a witness in his own behalf.

Petitioner's contentions, Mr. Leaphart's testimony at the federal habeas corpus evidentiary hearing revealed that he was thoroughly familiar with Petitioner's background and that he made a reasoned tactical decision not to put the Petitioner or Petitioner's mother on the witness stand so as to keep from the jury, on cross-examination, testimony regarding the Petitioner's past criminal history. In this regard, the district court and the circuit court properly concluded that the Petitioner's contentions that Mr. Leaphart failed to investigate and prepare for the sentencing phase of trial were all without merit.

In concluding this response to the second portion of Petitioner's Contention No. 1, Respondent notes that on this application, as in the district court and before the circuit court, counsel for the Petitioner essentially argues that any trial attorney who fails to place the criminal defendant on the witness stand during the sentencing phase of a capital case has rendered ineffective assistance of counsel, notwithstanding the defendant's background or the trial strategy utilized by defense counsel. Due to the inherent nature of capital litigation, it is the observation of Respondent's counsel that had Mr. Leaphart placed the Petitioner on the witness stand during the sentencing phase of trial, and had Mr. Leaphart used the "lukewarm" character testimony advocated by the Petitioner in the district court below, Petitioner would just as vigorously argue before this Court that Mr. Leaphart had rendered the ineffective assistance of counsel by so placing the Petitioner on the witness stand, thus subjecting him to a damaging cross-examination, and for using the "lukewarm" character testimony presently presented and advocated by Petitioner. Obviously, the foregoing assumes that such testimony would have been made available to defense counsel at trial, which assumption is not only unsupported by the evidence

adduced at the March 4, 1981 federal habeas corpus evidentiary hearing, but is directly contradicted by the same. As noted by the district court at Blake v. Zant, 513 F.Supp. 772, 802 n. 13 (S.D. Ga. 1981):

> However, many, if not all, the allegations made against Mr. Leaphart are directly contradicted by the record. Thus, they could not possibly be of any benefit to Mr. Burger. On the other hand, the raising of such unfounded charges must have a significant "chilling effect" on the willingness of experienced attorneys, like Mr. Leaphart, to undertake the defense of capital cases. Petitioner's attorneys here might do well to reconsider their apparent policy of routinely attacking the performance of trial counsel in light of this fact.

Respondent notes that it appears inherent in capital litigation that no matter the quality or nature of the assistance rendered by defense counsel at trial, counsel in habeas corpus will routinely contend that the same was ineffective. The instant case constitutes such an example, and Petitioner's contentions of the alleged ineffective assistance of counsel, as the same are totally without merit, cannot serve as the basis of the granting of the requested writ.

B. PETITIONER'S CONTENTION THAT IN GODFREY V. GEORGIA, 446 U.S. 420 (1980), THIS COURT RULED O.C.G.A. § 17-10-30(b)(7), FORMER GA. CODE ANN. § 27-2534.1(b)(7) TO BE UNCONSTITUTIONAL ON ITS FACE, IS DERIVED FROM A MISREADING OF GODFREY V. GEORGIA, SUPRA, AND THUS, CANNOT SERVE AS A BASIS FOR GRANTING THE REQUESTED WRIT. (Contention No. 2).

On this second contention, Petitioner alleges that "a death sentence based solely on § (b)(7), such as Christopher Burger's cannot stand," because in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) this Court "made clear" its ruling in Godfrey v. Georgia, 446 U.S. 420 (1980) that O.C.G.A. § 17-10-30(b)(7), former Ga. Code Ann. § 27-2534.1(b)(7), is unconstitutional on its face. In support of his misreading of Godfrey v. Georgia, supra, Petitioner cites this Court to footnote 4 of Zant v. Stephens, supra at 2737. In the aforementioned footnote, this Court stated:

> Thus, this case does not implicate our holding in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), that the (b)(7) aggravating circumstance as construed by the Georgia Supreme Court was unconstitutionally broad and vague.

In footnote 4 of its opinion in Zant v. Stephens, supra, this Court merely made reference to the fact that of the three statutory aggravating circumstances given to Stephens' jury in charge on the sentencing phase of trial, the jury did not return a finding of the § (b)(7) statutory aggravating circumstance. In this regard, in footnote 4 cited above, this Court merely noted that "this case does not implicate our holding in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), . . . "

An examination of the relevant portions of this Court's opinion in Godfrey v. Georgia, supra, readily reveals the fact that Petitioner has lifted out of context footnote 4 of this

Court's opinion in Zant v. Stephens, supra and cited the same in support of his argument that in Godfrey v. Georgia, supra, this Court ruled the § (b)(7) statutory aggravating circumstance to be unconstitutional on its face.

In pertinent part, O.C.G.A. § 17-10-30(b)(7) provides as follows:

> The offense of murder, . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

In Godfrey v. Georgia, supra, the jury recommended imposition of a sentence of death based upon a partial finding of the § (b)(7) statutory aggravating circumstance, i.e., "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." Id. at 426. Confronted with such a partial finding of the § (b)(7) statutory aggravating circumstance, this Court opined in Godfrey v. Georgia, supra that "[t]here is nothing in these few words, standing alone, that applies any inherent restraint on the arbitrary and capricious infliction of the death sentence." Id. at 428.

Respondent notes that an examination of Godfrey v. Georgia, supra, readily reveals that in the aforementioned case this Court found that the application of a partial finding of the § (b)(7) statutory aggravating circumstances did not serve to properly circumscribe the class of persons eligible for the death penalty. As applied to the particular facts of Godfrey's case, this Court found that the partial application of the § (b)(7) statutory aggravating circumstances was unconstitutional. Contrary to Petitioner's contentions on the instant petition for a writ of certiorari, this Court did opine in Godfrey v. Georgia, supra, that the § (b)(7) statutory aggravating circumstance was unconstitutionally vague on its face. Accordingly, this contention cannot serve as the basis for the granting of the requested writ.

C. PETITIONER'S CONTENTION THAT THE TRIAL COURT'S CHARGE IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF ON THE ISSUE OF CRIMINAL INTENT HAS BEEN PROPERLY FOUND TO BE TOTALLY WITHOUT MERIT BY EVERY STATE AND FEDERAL REVIEWING COURT, ACCORDINGLY, THIS CONTENTION CANNOT SERVE AS THE BASIS FOR THE GRANTING OF THE REQUESTED WRIT.

On this final contention, Petitioner first alleges that this Court should grant a writ of certiorari based upon its recent grant of the writ in Koehler v. Engle, 707 F.2d 241 (6th Cir. 1983), cert. granted, ___ U.S. ___, 104 S.Ct. 231 (1983). Koehler v. Engle, supra, however, is readily distinguishable from the instant case. In Koehler v. Engle, 707 F.2d at 241, the jury was instructed that "malice is implied from any deliberate and cruel act against another person, however sudden." Further, the jury was instructed that " . . . the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts." At no point in the trial courts charge was Engle's jury instructed that the foregoing presumptions were rebuttable. Further, only general instructions on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt were given in a case where Engle's sole defense was temporary insanity occasioned by the effects of alcohol, drugs and a disassociative reaction, a temporary mental disorder which is often accompanied by memory loss.

In the instant case, unlike in Koehler v. Engle, supra, Petitioner's jury was specifically informed that "a person will not be presumed to act with criminal intention, but the jury may find such contention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted."

(T.T. at 409). This Petitoner's jury was further instructed that each and every presumption given in charge was rebuttable. Petitioner's jury was charged that a specific intent to commit the crime of murder is an essential element that the state bore the burden of proof upon beyond a reasonable doubt. Further, Petitioner's jury was charged that "intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven facts, or by acts and conduct, or it may be presumed if it is the natural and necessary consequences of the act." (T.T. at 410-411). With specific reference to the immediately preceding last phrase of the trial court's charge, the trial court had previously and specifically charged that each and every presumption given was rebuttable.

As the foregoing readily reveals, unlike the circumstances in Koehler v. Engle, supra, the trial court's charge in the instant case, when properly construed as a whole, reveals that the same created nothing more than a permissible inference on the issue of intent, which inference the Petitioner's jury was free to draw or not to draw. Thus, this Court's granting of certiorari in Koehler v. Engle, supra, has no impact upon this case.

Next, Petitioner contends that the trial court's instruction on the issue of intent is in conflict with this Court's holding in Sandstrom v. Montana, 442 U.S. 510 (1979). Addressing specifically this allegation, Respondent notes that the trial court's charge is located at pages 410-411 of the trial transcript. In this instant case, the Petitioner was indicted, tried, and convicted of the crime of malice murder. In pertinent part, O.C.G.A. § 16-5-1 defines the offense of murder as follows:

> A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another

> human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

As an examination of the foregoing code section reveals, under Georgia law, an individual commits malice murder when he (1) unlawfully (2) with malice aforethought (3) causes the death of another human being. Under the foregoing analysis, the unlawful intent to kill is an integral part of an essetial element of murder, i.e., malice aforethought, and in this regard the jury was so charged.

At the onset of his instructions to the jury, the trial court specifically informed Petitioner's jury that:

> I charge you that the defendant enters upon the trial of this case with the presumption of innocence in his favor and that presumption remains with him throughout the trial and until the state shall introduce sufficient evidence in your presence and hearing to convince your minds beyond a reasonable doubt as to his guilt. (T.T. at 404)

* * *

> A person will not be presumed to act with criminal intention, but the jury may find such contention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted. (T.T. at 409).

Thus, at the outset of the trial court's instructions, Petitioner's jury was thoroughly apprised of the defendant's presumption of innocence and the state's burden of proving every element of the crime charged beyond a reasonable doubt. Regarding the natural and necessary consequences of one's acts, the trial court gave the following charge.

> Now, by definition, ladies and gentlemen, in our state a crime is a violation of a statute of this state in which there shall be a union of joint operation of act, or omission to act, and intention, or criminal negligence. I give you certain presumptions of law that are applicable to this case.
>
> A presumption is a conclusion which the law draws from given facts. Each of these presumptions are rebuttable. That is, they are subject to being overcom by evidence to the contrary.
>
> I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the product of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention but the jury may find such contention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they (sic) accused is prosecuted.

> A specific intent to commit the crime charged in this indictment is an essential element that the state must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven facts, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act. (T.T. at 410-411).

It is with regard to the immediately preceding phrase, " . . . or it may be presumed when it is the natural and necessary consequences of the act," that Petitioner contends his constitutional rights were violated in that the subject charge allegedly relieved the state of its burden of proof on the element of criminal intent.

As correctly noted by the district court, and affirmed by the circuit court, there exists no per se rule against charging the truism that a person is normally presumed to intend the natural and probable consequences of his actions. United States v. Chiantese, 560 F.2d 1244, 1255-1256 (5th Cir. 1977). Thus, as stated by this Court in Sandstrom v. Montana, 442 U.S. 510 (1979), citing Ulster County Court v. Allen, 442 U.S. 140 (1979), "[t]he threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." Id. at 514. In this regard, this Court stated that:

> That determination requires careful attention to the words actually spoken to the jury (cite omitted), for whether a defendant has been afforded his

constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.

Sandstrom, supra at 514.

In Ulster County Court, supra, this Court stated:

> Inferences and presumptions are a staple of our adversary system of fact finding. It is often necessary for the trier of fact to determine the existence of an element of the crime - that is, an "ultimate" or "elemental" fact - from the existence of one or more "evidentiary" or "basic" facts. (cites omitted).
>
> The value of these evidentiary devices and their validity under the due process clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the fact finders' freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the fact finder's responsibility at trial, based on evidence adduced by the state, to find the ultimate facts beyond a reasonable doubt.

Id. at 156.

In Ulster County Court, supra, this Court defined a permissive persumption or inference as follows:

> The most common evidentary device is the entirely permissive inference or presumption, which allows - but does not require, the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant.

Id. at 157.

With regard to mandatory presumptions this Court stated the following:

> . . . it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.

(Emphasis added). Id. at 1257.

Upon a challenge to the constitutionality of an instruction which creates a permissive presumption or inference, the Court stated that the party challenging such an instruction must demonstrate its invalidity as applied to him, i.e., he must demonstrate that under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. Id. at 157.

Upon a challenge to the constitutionality of a mandatory presumption, this Court stated that such a presumption is usually examined "on its face to determine the extent to which the basic and elemental facts coincide." For a mandatory presumption to pass constitutional muster, there must be "a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former." Ulster County Court, supra, at 165. Accord, Hammondtree v.

Phelps, 605 F.2d 1371 (5th Cir. 1979). With the foregoing propositions in mind, the Respondent notes that in Skrine v. State, 244 Ga. 520, ___ S.E.2d ___ (1979), the Supreme Court of Georgia addressed itself to an identical challenge to the subject charge, and in light of Sandstrom v. Montana, and Ulster County Court, concluded that the charge challenged, when properly viewed as a whole, created nothing more than a mere permissive presumption which "'allows - but does not require - the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one, and that places no burden of any kind on the defendant.'" Skrine, supra at 521.

Respondent notes that construing the charge as a whole, as required by Cupp v. Naughten, 414 U.S. 141 (1973) every state and federal reviewing court concluded that the same created nothing more than a mere permissive presumption, and thus, the district court and the circuit court properly analyzed the subject charged under the "rational connection test." Succinctly stated by the district court, "[t]he proper question thus becomes whether there was a rational basis under which the jury might infer criminal intent from the defendant's actions with respect to the murder." Blake v. Zant, 513 F.Supp. at 973. In this regard, the district court correctly opined that:

> The evidence, of course, indicated that Mr. Burger raised the trunk lid of the victim's taxicab and specifically asked him if he were alright. Mr. Burger himself then drove the vehicle directly into the pit where it submerged, drowning Private Honneycutt. There can be no real doubt as to whether there exists a rational basis by which the jury could conclude that this course of conduct was intended by the Petitioner. Furthermore, these circumstances, as well as other evidence in the record clearly provide

> ample basis to support a conviction independent of any presumption. 442 U.S. at 160. Nor does it appear that any problem would be created by replacement of the rational relationship tests by a more stringent "reasonable doubt" standard. See Barnes v. United States, 412 U.S. 837, 842-43 (1978). Here, it seems entirely clear that the facts upon which the presumption is founded are sufficient to support an inference of intent to kill beyond a reasonable doubt. See Ulster County, supra at 166.

Blake v. Zant, 513 F.Supp. at 793.

Respondent notes that in addition to the general charge on presumption of innocence and the state's burden of proof beyond a reasonable doubt on each and every element of the crime charged, Petitioner's trial court was careful to specifically charge that the Petitioner would not be presumed to act with criminal intention that intent was an essential element of the crime charged that the state must prove beyond a reasonable doubt, that the presumption referred to in the "natural consequences" instruction was rebuttable, and with reference to the specific location of the relevant portions of the trial court's charge, immediately following the "natural consequences" instruction the trial court again charged the jury that a person will not be presumed to act with criminal intention. As succinctly stated by the district court:

> In sum, the trial court's charge does not appear to create any real possibility of impermissible-shifting. The situation condemned in Chiantese, Mann [Mann v. United, 319 F.2d 404 (5th Cir. 1963)] and Sandstrom is simply not present here.

> Instead, the challenged instructions specifically remind the jury that the burden of proof remains at all times on the state. These instructions create only a permissive inference which the jury is left free to accept or reject in accord with its view of the evidence. Furthermore, it appears that this evidence amply supports the inference whether evaluated under a "rational basis" or a "reasonable doubt" test. Accordingly, Petitioner's claim of error is without merit.

Blake v. Zant, 513 F.Supp. at 973-794.

Finally, in support of his third contention, Petitioner alleges that this Court should grant certiorari to resolve the issue of whether a Sandstrom violation can properly be found to constitute harmless error, which issue was left unresolved in Connecticuit v. Johnson, ___ U.S. ___, 103 S.Ct. 969 (1983), and that this Court should use this case as a vehicle to eleviate perceived ambiguities by the lower courts regarding alleged Sandstrom violations. Contrary to this Court's long standing tradition of not rendering advisory opinions and deciding cases on constitutional grounds only when there exist other adequate grounds for resolution, Petitioner advocates that this Court should grant certiorari and, in a cavalier manner, set itself about the business of righting every conceivable constitutional violation that might be engendered by a burden-shifting charge. Quite wisely, this has never been the Court's attitude regarding its function in the judicial process. Petitioner's advocation of a "new approach" to constitutional litigation is unwise and untenable.

For all the above and foregoing reasons, Petitioner's contention number three cannot serve as the basis for the granting of the requested writ.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Eleventh Circuit Court of Appeals as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed, in addition to being demonstrable in accord with the applicable decisions of this Court, is soundly based upon a proper construction of federal law.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

Marion O. Gordon

MARION O. GORDON
First Assistant Attorney General

Susan V. Boleyn

SUSAN V. BOLEYN
Assistant Attorney General

William B. Hill, Jr.

WILLIAM B. HILL, JR.
Senior Assistant Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3359

CERTIFICATE OF SERVICE

I, William B. Hill, attorney of record for the Respondent and a member of the bar of the Supreme Court of the United States certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief for the Respondent in opposition upon the Petitioner's attorney, by depositing a copy the same in the United States Mail with proper address and adequate postage to:

Joseph M. Nursey
Millard C. Farmer
P. O. Box 1978
Atlanta, Georgia 30301

This 19th day of March, 1984.

WILLIAM B. HILL, JR.

MAR 23 PAGE 14

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-6413 A-755

CHRISTOPHER A. BURGER,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

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RESPONSE IN OPPOSITION TO PETITIONER'S
REQUEST FOR A STAY OF EXECUTION
PENDING DISPOSITION OF PETITIONER'S
PETITION FOR A WRIT OF CERTIORARI

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General
Counsel of Record
for the Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

SUSAN V. BOLEYN
Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

QUESTION PRESENTED

1.

Should Petitioner's request for the issuance of an order staying his presently scheduled execution, which request is based solely on the pendency of his petition for a writ of certiorari, be denied?

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED. i

STATEMENT OF THE CASE. 1

STATEMENT OF FACTS. 4

ARGUMENT AND CITATION OF AUTHORITY

A. PETITIONER'S REQUEST FOR THE ISSUANCE OF AN ORDER STAYING HIS PRESENTLY SCHEDULED EXECUTION, WHICH REQUEST IS BASED SOLELY ON THE PENDENCY OF HIS PETITION FOR A WRIT OF CERTIORARI, SHOULD BE DENIED.. 10

CONCLUSION. 14

CERTIFICATE OF SERVICE. 15

TABLE OF AUTHORITIES

Cases Cited:	Page(s)
Barefoot v. Estelle, ___U.S.___, 103 S.Ct. 3383 (1983)	10,11,12
Burger v. State 242 Ga. 28, 247 S.E.2d 834 (1978)	1,4
Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980)	1,4
Burger v. Zant, 718 F.2d 979 (11th Cir. 1983)	3,13
Stephens v. State, 242 Ga. 34, 247 S.E.2d 838 (1978)	4
Stephens v. Zant, 631 F.2d 397, modified on panel rehearing, 648 F.2d 446 (5th Cir. 1981)	2

IN THE
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RESPONSE IN OPPOSITION TO PETITIONER'S
REQUEST FOR A STAY OF EXECUTION
PENDING DISPOSITION OF PETITIONER'S
PETITION FOR A WRIT OF CERTIORARI

PART ONE

STATEMENT OF THE CASE

The Petitioner was convicted of murder in the Superior Court of Wayne County, Georgia on January 25, 1978. A sentence of death was imposed. On direct appeal to the Supreme Court of Georgia the Petitioner's conviction was affirmed; however, the Petitioner's sentence of death was vacated and a new trial was ordered as to punishment at Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978).

The Petitioner was subsequently retried on the issue of punishment and on July 19, 1979 the Petitioner was again sentenced to death. On direct appeal from the reimposition of the death penalty the Supreme Court of Georgia affirmed the Petitioner's sentence at Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980).

State habeas corpus relief was denied on October 1, 1980 by the state habeas corpus court, which denial of relief was

CERTIFICATE OF SERVICE

I, William B. Hill Jr., attorney of record for the Respondent and a member of the bar of the Supreme Court of the United States certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Response in Opposition to Petitioner's Request for a Stay of Execution Pending Disposition of Petitioner's Petition for a Writ of Certiorari upon the Petitioner's attorney, by depositing a copy the same in the United States Mail with proper address and adequate postage to:

Joseph M. Nursey
Millard C. Farmer
P. O. Box 1978
Atlanta, Georgia 30301

This 20th day of March, 1984.

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

affirmed by the Supreme Court of Georgia on that same date. From the denial of habeas corpus relief in the state courts, on October 2, 1980 the Petitioner filed an application for habeas corpus relief in the United States District Court for the Southern District of Georgia, Brunswick Division.

After conducting an extensive evidentiary hearing on March 4, 1981 the district court, on April 29, 1981 rendered its Order and Judgment granting the Petitioner habeas corpus relief in the form of an Order vacating Petitioner's sentence of death. The district court afforded habeas corpus relief in this regard based solely upon the circuit court's decision in Stephens v. Zant, 631 F.2d 397, modified on panel rehearing, 648 F.2d 446 (5th Cir. 1981).[1] The district court denied Petitioner's request for habeas corpus relief on all other allegations contained in his petition.

On May 11, 1981 the Respondent filed his notice of appeal from the district's granting of habeas corpus relief in the form of an Order vacating Petitioner's sentence of death. Petitioner filed a timely cross-appeal from that portion of the district court's Order denying habeas corpus relief on all other allegations contained in the petition.

On October 13, 1983, after extensive briefing and oral argument, the United States Court of Appeals for the Eleventh

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[1]On Argument before the United States Court of Appeals for the Eleventh Circuit, counsel for the parties agreed that this Court's then pending decision in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) would control dispostion of the sole basis upon which habeas corpus relief was afforded by the district court. As is revealed by an examination of the circuit court's opinion below at Burger v. Zant, 718 F.2d 979, 982 (11th Cir. 1983), in light of this Court's opinion in Zant v. Stephens, supra, the district court's grant of habeas corpus relief was reversed.

Circuit rendered its opinion reversing the district court's granting of habeas corpus relief. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983).

On February 13, 1984, Petitioner's petition for rehearing and suggestion for rehearing en banc was denied. On February 27, 1984 the circuit court denied Petitioner's request to stay the mandate pending filing of an application for a writ of certiorari in this Court. On March 6, 1984, upon receipt of the mandate of the circuit court, the district court entered its Order making the judgment of the United States Court of Appeals for the Eleventh Circuit the judgment of the district court. From the denial of habeas corpus relief Petitioner has pursued an application for a writ of certiorari, which application was docketed in this Court on March 14, 1984.

By Order dated March 15, 1984, the trial court scheduled Petitioner's execution for March 27, 1984. In response thereto, Petitioner has filed the instant request for the issuance of an Order by this Court staying his presently scheduled execution. Respondent vigorously opposes Petitioner's request..

STATEMENT OF FACTS

As noted by the Supreme Court of Georgia on the appeal taken by the Petitioner following his retrial on sentencing and the reimposition of a sentence of death, "[t]he facts surrounding the death of the victim, Roger Honeycutt, are amply set out in Burger v. State, supra and its companion case, Stephens v. State, 242 Ga. 34 (247 S.E.2d 838)(1978) and will not be repeated here." Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980). Because the facts underlying Petitioner's reimposed sentence of death are the same as those adduced on his trial of January 23 and 24, 1978 which resulted in his conviction and original sentence of death, the transcript references in the following statement of facts are to the transcript of the original trial of January 23 through 24, 1978.

James Botsford, an army tank driver stationed at Fort Stewart, Georgia, had known Petitioner and co-indictee Thomas D. Stevens in Army Basic Training. (T. 85-88). Arriving at the Savannah Airport on September 4, 1977, Botsford telephoned the army base to ask about getting a ride from the airport to Fort Stewart. (T. 88-89). He spoke to Petitioner who told him that he and Stevens would pick him up at the airport. (T. 89). About two hours later Petitioner and Stevens arrived at the airport driving a taxicab. (T. 90). After Botsford got in, with Petitioner driving, he was told by Petitioner and Stevens that the cab was stolen. (T. 91, 95).

Stevens informed Botsford that he and Petitioner had forced the cab driver with a knife and knife sharpener to give them money, perform "unnatural acts" and then get into the car trunk. (T. 96). Although Stevens did most of the talking, Petitioner was agreeing with what was said. (T. 93). Stevens then called back to the trunk: "'Are you still there?'" Botsford heard a voice reply, "Yes sir." (T. 97). Stevens showed Botsford a knife and knife sharpener, which he put under the front seat. (T. 97).

During the ride back to Port Stewart, Stevens called back to the trunk several times asking the cab driver if he was there. (T. 103). Botsford always heard a voice answer. (T. 103). Stevens said that he had sexually assaulted the driver and that they should kill him and burn the car. (T. 100, 101). Botsford asked Petitioner and Stevens to free the driver and he told them that he would not tell the law if they would not kill the cab driver. (T. 100-104). Petitioner and Stevens both agreed to let the driver go. (T. 100, 104).

The following evening, Botsford was visited at Port Stewart by fellow soldiers Petitioner and Stevens who asked him if he had said anything. (T. 106). When Botsford told them he had not, they said they had freed the cab driver and ditched the car near Hinesville, Georgia. (T. 107). Prompted by a radio bulletin that he later heard regarding a missing cab driver, Botsford went to the State Patrol and the Army Criminal Investigation Department with the information he possessed. (T. 108-109).

An army investigation, John Berzenski, was notified on September 6, 1977 of a missing cab and driver. (T. 134). Berzenski and Clarence Haire, also an army investigator, found a boot on Highway 144 with the name of Roger Honeycutt inside. (T. 135, 136, 141). They found another boot, army socks, and a piece of yellow plastic approximately 200 yards within each other on Highway 144. (T. 137-138, 144-147).

Honeycutt, the missing cab driver, was an army private also stationed at Port Stewart, Georgia. (T. 121). He drove for the D&M Cab Company on nights and weekends. (T. 120-121).

Haire questioned members of Honeycutt's unit on September 9th in an attempt to locate Honeycutt. (T. 149). One of the men he questioned was Petitioner who told him that he had a friend who called the Shuman Cab Company about 10:00 p.m. on September 4th, but that they did not take the cab when it arrived at Port Stewart. (T. 149-150). A Shuman cab driver

testified that he did in fact get a call from Fort Stewart on September 4th, and in response thereto, he drove there accompanied by a friend. (T. 129-130). Two men asked him if he had change for $50.00, then left and did not return. (T. 130, 131). They had told him they were going to the airport. (T. 130). As the Shuman cab driver was leaving, the driver saw a D&M cab drive away from a nearby building at about 10:15 or 10:20 p.m. (T. 131).

A Jackson-Denno hearing was held outside the presence of the jury at trial to determine the voluntariness of the statement made to Investigatior Haire and Wayne County Detective F.J. Shuman. (T. 169-168). The trial court heard testimony from Haire, Detective Shuman and defense witness Dr. Joseph O'Haire, a clinical psychologist. Dr. O'Haire testified that Petitioner had a "mental deficiency" and a "psychopathic personality" that made him want to do wrong. (T. 248, 250). After hearing the testimony, the court ruled that the statements were voluntarily made. (T. 268).

The jury was returned to the courtroom and Investigator Haire testified that he interviewed the Petitioner on September 12th and advised Petitioner of the Miranda warnings. (T. 269-270). Petitioner stated that he did not want a lawyer and would answer any questions posed, after which Petitioner executed a waiver of rights form. (T. 272-273). At first, Petitioner denied any knowledge of Roger Honeycutt or Honeycutt's disappearance. (T. 276). When informed that there existed information that he had been in possession of the missing taxicab, Petitioner made a statement. (T. 278). Investigator Haire related the contents of Petitioner's statement to the court and to the jury. Petitioner stated that when he and Stevens ran out of money while drinking beer at the enlisted men's club, Stevens suggested robbing a taxicab driver. (T. 278-279). The two men summoned a Shuman Company cab, but decided not to take it when it arrived with two men

inside. (T. 279). Petitioner and Stevens then received a telephone call from Botsford, who was at the Savannah Airport, requesting a ride to Fort Stewart. Petitioner agreed to pick Botsford up at the airport. (T. 279).

Stevens and Petitioner next burglarized the dining facility where Stevens got a knife sharpener and Petitioner got a butcher knife. (T. 278). Thus armed, the two men telephoned and requested a D&M cab. (T. 280). When the cab arrived, Petitioner and Stevens asked the driver if he could change a $50.00 bill, and the driver said he could. (T. 280). Approximately fifteen miles away from the army base on Highway 144, as planned by a prearranged signal, Stevens placed the knife sharpener around the driver's neck while Petitioner put the butcher knife to the driver's ribs. (T. 280).

The driver was instructed to pull over and get out, and to give Petitioner and Stevens all of his money. When the driver gave Petitioner and Stevens only $16.00, the two asked the driver if he had more money, and when he stated that he did not, they forced the driver into the back seat of the taxi. (T. 281). Stevens then had the driver remove his boots and clothes which Stevens searched for money. (T. 281). With Petitioner driving, Stevens threw each item of the driver's clothing out of the window after it had been searched for more money. (T. 281). In addition to searching the driver and his clothing, Stevens and Petitioner also searched the automobile for money. (T. 281).

After robbing the driver and forcing him to disrobe, Stevens forced the victim to perform oral sodomy on him. (T. 282). Stevens then performed anal sodomy on the victim. (T. 282). Before they reached the airport, Petitioner and his cohort forced the bound driver into the trunk of the taxicab. (T. 282). Petitioner and Stevens then proceeded on to the Savannah Airport where they picked up their friend Botsford and bragged to him that they had stolen the taxicab and had the

bound driver secured in the trunk. (T. 283). Petitioner and Stevens, in order to convince Botsford of the truth of their story, called back to the driver, requiring that the driver respond. (T. 283). Stevens suggested that they kill the driver, but Botsford protested and asked them not to do so. (T. 284).

After dropping Botsford off at Fort Stewart, Georgia, Petitioner and Stevens drove on to Jesup, Georgia, where they careened up and down several dirt roads to make the car go "from side to side," forcing the victim to roll around in the truck. (T. 284). The two men then stopped at a convenience store where Stevens removed the taxicab's dome light and hid it in the bushes. (T. 284).

After noticing a patrol car following them for a short period of time, Petitioner and Stevens decided to get rid of the taxicab. (T. 285). The two men drove to a "borrow pit" where they had gone swimming several times in the past. Petitioner and Stevens were careful to wipe their fingerprints from every area of the taxicab. (T. 286). Afterwards, Petitioner raised the lid of the trunk and asked the victim if he was alright. The victim responded that he was, and Petitioner closed the lid of the trunk. (T. 346). Petitioner then started the automobile and drove it into the "borrow pit," jumping from it just before impact with the water. (T. 286, 289). Petitioner and Stevens waited at the scene of the murder, watching the taxicab as it slowly sunk beneath the surface of the water. (T. 286). Petitioner further stated to Investigator Haire that they had tied the victim's hands with cord cut from the taxicab's C.B. radio, and that they had thrown the radio into the bushes beside the "borrow pit." (T. 286). To Investigator Haire, Petitioner admitted that he and Stevens killed the taxicab driver to prevent him from identifying them later. (T. 287).

After completing his statement to Investigator Haire, Petitioner offered to show Haire where the borrow pit was located. (T. 89). Haire and two other men from the criminal investigation office, pursuant to Petitioner's directions, proceeded to the borrow pit. (T. 289). Shortly afterwards, Detective Mike Deal arrived at the borrow pit where the missing taxicab was ultimately recovered. (T. 152, 161). A knife and a knife sharpener were found on the right floorboard of the cab. (T. 157, 158). A body in the trunk of the car was subsequently identified as that of Roger Honeycutt. (T. 306, 308, 311). The victim's death was established as being caused by drowning. (T. 308).

Wayne County Detective P.J. Shuman testified at trial that he took Petitioner from Fort Stewart authorities to the Wayne County Jail on September 13, and advised Petitioner of the Miranda warning. (T. 319-320). Shuman and Petitioner went over Petitioner's statement to Haire word by word, and Petitioner affirmed to Shuman everything contained in the statement. (T. 322). Petitioner also added that he and a friend returned to the borrow pit to get the C.B. radio, and that the radio was in Petitioner's mother-in-law's automobile. (T. 323).

On September 14, Petitioner directed Wayne County authorities over the same route that he and Stevens had driven the stolen taxicab. (T. 325). The cab's dome sign was recovered from the bushes near a convenience store, and the yellow plastic found on Highway 144 was determined to have come from the taxicab's dome sign. (T. 326, 328, 329).

Further facts will be developed on this response as needed to further illuminate any issue raised herein.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

A. PETITIONER'S REQUEST FOR THE ISSUANCE OF AN ORDER STAYING HIS PRESENTLY SCHEDULED EXECUTION, WHICH REQUEST IS BASED SOLELY ON THE PENDENCY OF HIS PETITION FOR A WRIT OF CERTIORARI, SHOULD BE DENIED.

On this application for the issuance of an Order by this Court staying his presently scheduled March 27, 1984 execution, Petitioner relies upon the pendency of his petition for a writ of certiorari filed in this Court as the sole basis for the granting of the requested Order. In Barefoot v. Estelle, __ U.S.___, 103 S.Ct. 3383 (1983) this Court established benchmarks to be utilized by counsel involved in capital litigation. With specific reference to requests for stays of executions, in Barefoot, supra at 3395 this Court stated the following:

> Stays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari from this Court to the Court of Appeals that has denied a writ of habeas corpus. It is well-established that there "'must be a reasonable probability that four members of the Court would consider the underlying issues sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision, and there must be a likelihood that irreparable harm will result if that decision is not stayed.'" (cites omitted).

> Applications for stays of death sentences are expected to contain the information and materials necessary to make a careful assessment of the merits of the issue and so reliably to determine whether plenary review and a stay are warranted. A stay of execution should first be sought from the Court of Appeals, and this Court generally places considerable weight on the decision reached by the circuit courts in these circumstances.

Id. at 3395.

In the instant case, after denying Petitioner's petition for rehearing and suggestion for rehearing en banc on February 13, 1984, the circuit court denied Petitioner's request to stay the mandate in an Order dated February 27, 1984. It is obvious to this Respondent that the United States Court of Appeals for the Eleventh Circuit is well aware that its refusal to stay the mandate, pending Petitioner's filing of an application for a writ of certiorari in this Court, was tanamount to the denial to Petitioner of a stay of execution pending the filing and disposition of a petition for a writ of certiorari in this Court. Accordingly, this Court should afford "considerable weight" to the decision of the circuit court.

In Barefoot, supra at 3391, this Court noted that direct appeal is the primary avenue for review of a conviction or sentence, with capital cases being no exception. "When the process of direct review -- which, if a federal question is involved, involves the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence." Id. at 3391.

Having identified the primary avenue for review of convictions and sentences, this Court noted that the role of federal habeas corpus proceedings, while important in assuring

that constitutional rights are observed, is secondary and limited in nature. "Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely." Id. at 3391. With specific reference to the inherent nature of capital litigation, this Court noted that:

> It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts. (cite omitted).

Id. at 3391.

In this regard, on an application for a stay of execution pending disposition of a petition for a writ of certiorari, as in the instant case, this Court specifically stated that stays of executions are not automatic and on such an application the burden rests upon the petitioner to demonstrate that (1) there exists a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorous for the grant of certiorari or the notation of probable jurisdiction, (2) there must be a significant possibility of reversal of the lower court's decision and (3) there must be a likelihood that irreparable harm will result if the lower court's decision is not stayed. Barefoot, supra at 3395.

In the instant case Petitioner merely incorporates in support of his request for a stay of execution, those arguments made in his petition for a writ of certiorari docketed in this Court on March 14, 1984. On March 19, 1984, via express mail, Respondent mailed for filing his response in opposition to Petitioner's petition for a writ of certiorari. An examination of Respondent's response in opposition, which Response is

incorporated as if fully set forth herein, reveals that all of Petitioner's issues presented to this Court for review are totally without factual support in the record, and without legal merit. Of considerable import is the fact that the circuit court, which court reversed the district court's grant of habeas corpus relief, denied Petitioner's petition for rehearing and suggestion for rehearing en banc, and denied Petitioner's request for a stay of the mandate pending filing and disposition of a petition for a writ of certiorari in this Court. After a careful and thorough legal analysis the circuit court, at Burger v. Zant, 718 F.2d 979 (11th Cir. 1983) determined that all of Petitioner's contentions were without factual support in the record and without legal merit.

In light of the exhaustive reviews afforded Petitioner by the state courts on direct appeal and in state habeas corpus proceedings and by the federal courts in federal habeas corpus proceedings, there exists no basis for the granting of Petitioner's petition for a writ of certiorari, and accordingly, no basis for the granting of the requested stay of execution. Therefore, Petitioner's request for a stay of his presently pending March 27, 1984 execution should be denied.

Alternatively, Respondent would request that this Court deny the petition for a writ of certiorari and deny the subject request for a stay of execution.

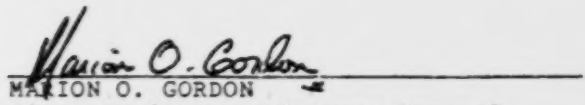
CONCLUSION

For all of the above and foregoing reasons, and for all of those reasons set forth in Respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari, this Court should deny the instant request for a stay of execution or denying the petition for a writ of certiorari and the subject request for a stay of execution.

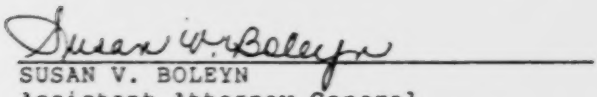
Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

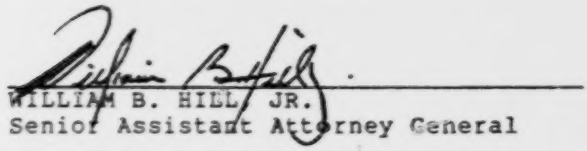
JAMES P. GOOGE, JR.
Executive Assistant Attorney General



MARION O. GORDON
First Assistant Attorney General



SUSAN V. BOLEYN
Assistant Attorney General



WILLIAM B. HILL, JR.
Senior Assistant Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3359